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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CENTRAL CALIFORNIA CANNERIES COMPANY,
Appellant.

GRIFFIN & SKELLEY COMPANY,
Appellant.

J. C. AINSLEY PACKING COMPANY,
Appellant.

ANDERSON-BARNGROVER MANUFACTURING
COMPANY,
Appellant.

GOLDEN GATE PACKING COMPANY,
Appellant.

J. F. PYLE & SONS, INC.,
Appellant.

HUNT BROTHERS COMPANY,
Appellant.

SUNLIT FRUIT COMPANY,
Appellant,

vs.

DUNKLEY COMPANY,
Appellee.

No. 2915.

Filed

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Brief on Behalf of Defendants-Appellants.

WILLIAM K. WHITE,
FREDERICK S. LYON,
KEMPER B. CAMPBELL,

Solicitors and Counsel for Defendant-Appellant.

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SUNLIT FRUIT COMPANY,	Appellant,	
vs.		
DUNKLEY COMPANY,	Appellee.	

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

PRELIMINARY REMARKS.

These eight cases come before this Court on ap-

peals from the respective interlocutory decrees therein, of the United States District Court for the Northern District of California, granting perpetual injunctions against the further infringement of claims 1, 2, 3, 4, 5, 6, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25 and 26 of United States letters patent No. 1,104,175, issued on July 21, 1914, to the appellee, Dunkley Company, as the assignee of the inventor, Samuel J. Dunkley, for "Machine for Peeling Peaches and Other Fruit."

Pursuant to the stipulation of all the parties in said eight cases, the same were tried at the same time upon the same evidence and proofs (R. 23).

For the sake of clearness and convenience, we hereafter shall refer to the appellee as the plaintiff and to all of the appellants as the defendant. The said letters patent sued on herein will be referred to as the Dunkley patent.

The defenses relied on attack the validity of said patent on various grounds, to wit: the public use of the patented invention for more than two years prior to the filing of the application for said patent; another public use of said invention prior to the date of the inventing thereof by the said Samuel J. Dunkley; and the prior inventing of said invention by another person. The question of infringement is not raised except as the same is involved in such attack on the validity of the Dunkley patent. Of course, an invalid patent cannot be infringed.

As the defenses raise the question of substantial

identity between the machine disclosed in the Dunkley patent and other machines publicly used prior to the filing of the application for such patent, we shall first consider the Dunkley machine *as described in the Dunkley patent*.

I.

THE DUNKLEY MACHINE.

The Dunkley machine is for peeling peaches and other fruit. In it, the peaches are first subjected to a solution such, for example, as a solution of caustic soda or lye, to disintegrate the skin and then the peaches are subjected to the action of *brushes* and sprays of water whereby the disintegrated skin is removed.

Broadly speaking, such machine embraces two separate and distinct instrumentalities, to wit: first, *the means for disintegrating the skin of the fruit*, consisting of the tank, containing the disintegrating fluid, and the carrier for conveying the fruit through such fluid, and second, *the means for removing the disintegrated skin*, consisting of an endless brush belt or carrier for brushing the fruit and at the same time conveying the same between two cylindrical rotating brushes, which both brush and rotate the same, and perforated water pipes through the perforations of which issues water, under pressure and in the form of spray, for washing the fruit.

The fact, that his machine so embraces two separate and distinct instrumentalities, is recognized by Dunkley, who says, beginning at line 121, page 2, of the Dunkley patent:

"I desire, therefore, to claim the *means* to remove the disintegrated peel *no matter how the disintegration is accomplished.*"

Beginning at line 22, page 1, of the Dunkley patent, Dunkley says, regarding his machine:

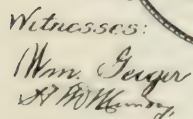
". . . it consists, in combination with a peel or skin softening, disintegrating or shriveling means or device, preferably consisting of a tank or chamber containing a heated fluid, and a heater for the same, a conveyor for automatically conveying the peaches through the skin softening, disintegrating or shriveling device and subjecting the peaches to its action for uniform and measured time, a chute or device for delivering the peaches in single file line to a *brushing* and *washing* mechanism, preferably comprising a group of three long perforated pipes for *spraying* water upon the moving line of peaches, and subjecting them to a water brushing action, an endless *brush* belt arranged between the two lower-most perforated pipes and *operating to brush the peaches* as they are rotated and to convey them along, and a pair of oppositely rotating cylindrical *brushes* operating both to rotate and *brush* the peaches, and having hollow perforated pipe cores for *spraying the rotary brushes* with water, and rotary cylindrical rubber sponge brushes, also having hollow perforated pipe cores for supplying the same with water, whereby the peaches may be very rapidly and cheaply and perfectly peeled without waste or injury."



APPLICATION FILED NOV. 29, 1904.

4 SHEETS-SHEET 3.

1,104,175.



Inventor.
Samuel J. Dunkley
By Monday, Evans & Asende,
Attorneys

Beginning at line 34, page 2, of the patent, Dunkley again refers to the *brushing* means and says:

"The washing and *brushing* mechanism further, preferably, comprises an endless belt-brush H, traveling on pulleys H'H² between the two lowermost water pipes GG and by which the peaches are conveyed along in single file and simultaneously *brushed* as they are rotated. This washing and *brushing* mechanism further, preferably, comprises a pair of oppositely rotating cylindrical brushes KK'; each having a hollow perforated water pipe K² for flooding the brushes with water as they rotate."

From the foregoing, it is apparent that, in the Dunkley machine, the disintegrated skin of the fruit is removed by the joint action of the brushes and water and not by the action of either one alone.

On the opposite page is reproduced sheet 3 of the drawings of the Dunkley patent. On this sheet are shown the endless carrier or belt *brush* H on which the peaches, after leaving the lye tank, are carried along in single file between the rotating cylindrical *brushes* KK', and, also, between the perforated water pipes GG. As Dunkley says, the belt *brush* H, not only conveys the peaches but also *brushes* them, thus assisting in the removal of the disintegrated skin. It will also be noted that he says the cylindrical *brushes* operate "both to rotate and *brush the peaches*," so they also assist in the removal of the skin.

It is to be noted that not a word is said in the

Dunkley patent in reference to the speed at which the brush belt or carrier H should run or the cylindrical brushes KK' should rotate, or in reference to the relative speeds at which said parts move. Anyone, attempting to practice the invention disclosed in such patent, would necessarily be compelled to use his own judgment as to the proper speed at which to convey the fruit through the brushing and washing means and as to the proper speed at which to rotate the cylindrical brushes.

Furthermore, there is not a word said in the Dunkley patent as to the amount of water pressure required in the operation of the Dunkley machine. The water is referred to therein as issuing from the perforated water pipes in the form of spray but not a word is said as to the amount of the pressure of such water. Therefore, anyone attempting to practice the Dunkley invention, would necessarily be compelled to use his own judgment as to the proper pressure under which to have such water.

Furthermore, there is not a word said in the Dunkley patent as to the strength of the disintegrating solution or the time required for it to disintegrate the skin. Those matters are also left to the judgment of anyone attempting to practice the invention.

In our opinion, no one, possessing ordinary common sense, would experience any difficulty in practicing the Dunkley invention, as described in said patent, by reason of such patent failing to give any information

regarding the features above referred to. In other words, the judgment of anyone, attempting to practice such invention, could be relied on to determine the proper speeds, respectively, of the brush belt and of the rotating brushes; the proper amount of water *pressure*; the proper strength of the disintegrating solution and the proper time of immersion therein of the fruit.

The reason of directing the Court's attention, at this time, to such failure of the patent to furnish information regarding such details of the construction and operation of the Dunkley machine is that plaintiff attempts to differentiate said Dunkley machine from a prior art machine, designated in the record as the Vernon machine, in respect to the said details, concerning which the Dunkley patent furnishes no information.

In other words, plaintiff's differentiation of the Dunkley machine from the said Vernon machine is based solely upon features concerning which the Dunkley patent is silent! However, we hereafter shall demonstrate that the uncontradicted testimony and evidence prove that such attempted differentiation is not, in fact, true and that said machines are substantially identical even in respect to the details of operation read into the Dunkley patent by plaintiff, but concerning which said patent is silent.

It is unnecessary to consider, at any length or in detail, the numerous claims of the Dunkley patent

which are involved in this suit. The question raised by the defenses, as to the validity of said claims, is a broad one and its determination does not require any consideration of the slight differences between the several claims or any separate consideration of any one claim. In other words, one of the anticipating machines, relied on by way of defense, admittedly embodies all of the respective combinations of elements respectively covered by all of said claims and the other anticipating machine is attempted by plaintiff to be differentiated from the Dunkley machine only in respect to certain features, a consideration of which does not require any consideration of the differences between said claims.

Therefore, it will be sufficient for the purposes of the argument to merely quote, at this time, claim 1 of the Dunkley patent as an example of the general type of claims to be found therein:

Claim 1: "In a peach peeling machine, the combination with a tank or chamber for containing a fluid for softening and loosening the skins, of means which extend through the tank for subjecting the same to the action of said fluid for a uniform period of time, and a washing, spraying and brushing mechanism at the exit end of the tank for removing the softened and loosened skins, co-operating substantially as described."

It will be noted that the skin removing means, specified in the claim, involves the *joint* action of water and brushes.

II.

SUMMARY OF DEFENSES.

Before discussing the principles of law controlling the determination of the issues of this litigation, we shall briefly outline the defenses relied on so that the Court may perceive the particular applicability of said principles to the issues raised by such defenses.

The Dunkley patent was applied for on November 29, 1904, and issued on July 21, 1914. The validity of said patent is attacked upon the following grounds, to wit:

1. Prior to the *date of Dunkley's alleged invention* of the Dunkley machine, there was built at Pasadena, California, by G. E. Grier, of the Pasadena Canning Company, two peach peeling machines which were commenced in April, 1903, and completed before the end of July, 1903. One of these machines was put into commercial use before August 1, 1903, at Pasadena, California, by the Pasadena Canning Company and thereafter used by said company throughout the 1903 peach season and throughout every subsequent peach season up to and including the 1914 peach season. The other machine, so built in 1903, by Mr. Grier, was sold to the Eastside Canning Company, of Los Angeles, and was put into commercial operation by that company in Los Angeles at least as early as August 3, 1903, and thereafter used throughout the

1903 peach season and every subsequent peach season for many years thereafter. These two machines were identical in construction and built at the same time. One of them is shown in the eight photographs and drawing marked "Exhibit B" and attached to the stipulation of the parties filed herein (R. 23). *In view of said stipulation there can be no question raised by plaintiff as to the substantial identity of the Grier and Dunkley machines, because plaintiff bases its charge of infringement herein upon such alleged identity between them in respect to each and all the Dunkley patent claims in suit.*

In 1904, Mr. Grier built two more complete peach peeling machines, each substantially identical with each of those built in 1903. He also, in 1904, built one of his shaker devices for use in a peach peeling machine. One of said machines was sold to the Orange County Preserving Company, of Anaheim, and the other to G. H. Waters Company, of Pomona. The shaker was sold to the G. H. Waters Fruit Company of Ontario. All of said machines were sold prior to the 1904 peach season and were put into commercial use during said season which began and ended before November 29, 1904, the date of Dunkley's application. *It thus appears that, prior to the date of Dunkley's application, five Grier machines were in commercial use in California.*

2. The said G. E. Grier, of Pasadena, California,

was the original and first inventor of the invention disclosed in the Dunkley patent and, therefore, Dunkley was not such original and first inventor but, on the contrary, he surreptitiously and unjustly obtained said patent for that which, in fact, was first invented by the said Grier, who, at all times, was using reasonable diligence in adapting and perfecting the same. This defense is based upon the facts that, during the peach season of 1902, Grier conceived the invention which was promptly and with reasonable diligence embodied by him in the two machines commenced in April, 1903, and completed and ready for use before the 1903 peach season. This defense is *separate and distinct* from that referred to in paragraph 1, although it is sustained *in part* by proof of all the facts relating to the defense of paragraph 1.

3. *More than two years prior to November 29, 1904, the date of the Dunkley application*, at the cannery of the California Fruit Cannery Association in Fresno, California, there was publicly, commercially and practically used, during the months of July, August and September, 1902, a peach peeling machine, known as the Vernon machine and, in all substantial respects, identical with the Dunkley machine disclosed in said patent. Prior to the 1903 peach season, said Association built three more Vernon machines, each of a capacity larger than the 1902 machine. One of these was installed in the Los Angeles plant of the

Association and was there used during the 1903 peach season under the superintendency of E. H. Kennedy. *It thus appears that, prior to the date of Dunkley's application, four Vernon machines had been built and were in commercial use in California.*

The Vernon machine was practically a duplication of the machine described in the Dunkley patent. It embraced a tank for containing the disintegrating solution of lye or caustic soda through which the peaches were automatically conveyed and a skin removing means consisting of an endless carrier belt for conveying the peaches between two rotating brushes and a perforated water pipe located above the endless carrier belt and from the perforations of which issued water *under pressure and in the form of spray* which played on the peaches on the carrier belt. One of the principal differences between the Vernon and Dunkley machines is that, in the Dunkley machine, the carrier belt H is a *brush belt* for *brushing* the peaches as well as conveying them, whereas, in the Vernon machine, the carrier belt was a leather belt serving simply to convey the peaches. By reason of such provision, in the Dunkley machine, of said *brushing* surface in addition to the *brushing* surface found in the Vernon machine, it is apparent that, in the Dunkley machine the action of *brushes* is more relied on, then in the Vernon machine, as a means of removing the disintegrated skin.

In paragraph 16 of defendants' answer (R. 11) an-

other defense is set up but the same will be discussed by us only so far as the facts, constituting the same, are significant in respect to plaintiff's attack on the defense based upon the prior use of the anticipating Vernon machine. Briefly, said fourth defense is, as follows:

4. That plaintiff does not come into court with clean hands but, on the contrary, has been guilty of acts of such an iniquitous character as to disentitle it to any relief in a court of equity, said acts being as follows: That plaintiff knew of the two years' prior public use at Fresno, California, of the anticipating Vernon machine by the California Fruit Canners Association and, for the purpose of making it as difficult as possible for any defendant to prove such use by way of defense to a suit brought for the infringement of the Dunkley patent, issued a *free license* under said patent for the life thereof to the California Fruit Canners Association with the understanding that said Association should align itself with plaintiff and put obstacles in the way of anyone attempting to prove such prior use; and that said Association pursued a course of action in accordance with such understanding.

III.

RULES OF LAW APPLICABLE TO A DETERMINATION OF THE
QUESTIONS INVOLVED HEREIN.

I. PUBLIC USE.

Section 4886 of the Revised Statutes provides that an invention, in order to be patentable, must not have been in public use or on sale in this country for more than two years prior to the application for the patent.

Section 4920 of the Revised Statutes provides, among other things, as follows:

"In any action for infringement, the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:

"Fifth. That it has been in public use or on sale in this country for more than two years before his application for a patent or had been abandoned to the public."

In *Egbert v. Lippmare*, 104 U. S., 333, the Supreme Court said:

"We observe, in the first place, that to constitute the public use of an invention, it is not necessary that more than one of the patented articles should be publicly used. The use of a great number may tend to strengthen the proof, but one well-defined case of such use is just as effectual to annul the patent as many. *McClurg v. Kingsland*, 1 How., 202; *Consolidated Fruit Jar Co. v. Wright*, 94

U. S., 92; *Pitts v. Hall*, 2 Blatchf., 229. For instance, if the inventor of a mower, a printing-press, or a railway car makes and sells only one of the articles invented by him, and allows the vendee to use it for two years, without restriction or limitation, the use is just as public as if he had sold and allowed the use of a great number.

"We remark, secondly, that, whether the use of an invention is public or private does not necessarily depend upon the number of persons to whom its use is known. If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, even though the use and knowledge of the use may be confined to one person."

2. BURDEN OF PROOF.

(a) *Presumptions of Law.*

A Patent is *prima facie* valid.

Bates v. Coe, 98 U. S., 31.

"In *Bates v. Coe*, 98 U. S., 31, Mr. Justice Clifford, speaking for the Court, said:

"The *presumption* in respect to the invention described in the patent in suit, if it is accompanied by application for the same, is *that it was made at the time the application was filed*; and the complainant or defendant may, if he can, introduce proofs to show that it was made at a much earlier date.'

"In the *Barbed Wire Patent Case*, 143 U. S., 275, the Court, in considering the evidence on the question of priority of invention, assumed that the date of the application of the patent in suit was the date

of the invention; and the same assumption was made in *Miller v. Eagle Manufacturing Company*, 151 U. S., 186."

Automatic Weighing Machine Co., v. Pneumatic Scale Corporation, 166 Fed., 294.

The parties hereto have stipulated that the date of application appearing on the copy of each patent introduced in evidence, shall be deemed proof of such filing date. (R. 21.)

In view of the foregoing authorities, the Dunkley patent, when introduced in evidence herein, was presumed, at that stage of the trial proceedings herein, to be valid, and the invention disclosed therein was presumed to have been made on November 29, 1904, *but was not presumed to have been made at any earlier date.*

There is no presumption of law or of fact that, prior to November 29, 1904, Dunkley did anything. In order to secure his patent, it was not necessary for Dunkley to first reduce his invention to practice or make a model of it or do anything other than merely file his application, which was filed on November 29, 1904.

"At the same time we have the equally well settled rule that an invention need not be perfected and adapted to use, or reduced to practice, in order to obtain a valid patent, since no such condition is contained in the statutes."

*Automatic Co. v. Pneumatic Corporation,
supra.*

It is obvious, therefore, that the presumption that a patent is valid in no way fortifies or strengthens any proof of any acts of the patentee prior to the filing of his application. Proof of such prior and antecedent acts must be tested and stand on its own intrinsic merits unfortified by any presumptions of law or of fact. *The law does not presume the patentee did anything prior to filing his application.*

"The patent being anticipated, if the date of application be taken as the date of invention, the burden rests upon the complainant to satisfy the court that the invention was made at an earlier date. *There is no presumption in favor of such a patent.* The burden which rested upon the defendant in the first instance has been transferred to the complainant and it must furnish the court with *convincing proof that the anticipation has been anticipated.*"

Westinghouse Co. v. Saranac Co., 108 Fed., 222.

In *Michigan Cent. R. Co. v. Consolidated Car-Heating Co.*, 67 Fed., 121, the Circuit Court of Appeals for the Sixth Circuit, through Judge Severens, Judges Taft and Lurton concurring, said:

"The evidence shows that the device, as patented, has been in public use for some time prior to the date of his application. If it be permissible, as contended, to maintain his patent upon

evidence, dehors the proceedings in the patent office, that he has made the invention at an earlier date *than is to be presumed from his application and patent*, so as to carry it back to ante-date the public use, the proof should be clear and unequivocal that he was the original inventor. *Eagleton Manufacturing Co. v. West Bradley & Cary Manufacturing Co.*, 2 Fed., 774, 777; Rob. Pat., Sec. 1026, note 14, and cases cited. There is much evidence in this record upon that subject. Without here going into detail, it suffices to say that we have serious doubt whether Cody was the original inventor of the device represented by this combination of his patent. *If the evidence in its favor were fortified by the presumption of validity afforded by the patent in ordinary cases*, we might think it right that that should turn the scale, and that this claim in the patent should be held valid. But the presumption does not apply in such circumstances, and the burden of proof is on the other side. We do not think it is sustained."

We wish to particularly emphasize the principle announced in the foregoing decision because said principle differentiates this case from the ordinary case involving merely a consideration of the sufficiency of a defendant's proof of a prior use. In this case, the sufficiency of plaintiff's proof, of what the patentee Dunkley did prior to November 29, 1904, must be considered by the Court. Further, said proof must be tested by an application of precisely the same rules that are applied in testing the sufficiency of proof of a prior use. Defendant's proof as to what Grier did in 1902 and in 1903 and the plaintiff's proof as to what

the patentee Dunkley did prior to November 29, 1904, stand, in the eyes of the law, on a plane of equality. The sufficiency of each must be determined by its own intrinsic merits, unfortified by any presumption of law or of fact. *As said by Judge Severens, the presumption of validity does not apply to or fortify proof of what the patentee did prior to filing his application.*

(b) *Shifting of Burden of Proof.*

The *prima facie* validity of the Dunkley patent was destroyed by:

1st. Introduction in evidence, as defendant's exhibit A (R. 97) of letters patent No. 864,944 issued on September 3, 1907, to H. A. Beekhuis, *upon his application filed on May 25, 1904.*

2nd. Proof of the public use of the Grier machine by the Pasadena Canning Company in July, 1903, and by the Eastside Canning Company as early as August 3, 1903, or more than a year prior to November 29, 1904, the filing date of the Dunkley application. The sufficiency of said proof was not seriously questioned or attacked by plaintiff in the lower Court and that Court's opinion herein (R. 696) apparently gives full credence to such proof. As before stated, the substantial identity between the Dunkley and Grier machines is admitted by plaintiff and it bases its charge of infringement herein upon such identity. (R. 23.)

The Beekhuis patent (R. 748) admittedly discloses

one of the two instrumentalities comprising the Dunkley machine, to-wit: "*Means for removing the previously disintegrated skin.*" Beekhuis refers to the initial subjection of the fruit to a caustic soda solution to disintegrate the skin thereon, but he does *not* disclose any *means or devices*, such as Dunkley's lye-tank having a conveyor running therethrough, whereby the fruit can be so treated with such a solution. In other words, the Beekhuis patent fails to disclose one of the two instrumentalities comprising the Dunkley machine, to wit: *means for disintegrating the skin*. In his patent, beginning at line 24, page 1 thereof, Beekhuis says:

"My invention has, therefore, for its object the removal of the *previously* disintegrated skin of the fruit. . . ."

It is apparent, therefore, that Beekhuis, like Dunkley, perceived that the skin *disintegrating means or instrumentality* had no necessary connection with the *means for removing the disintegrated skin*, but, unlike Dunkley, Beekhuis failed to disclose any such disintegrating means. We therefore find that all the claims in the Beekhuis patent respectively cover means for removing the *previously* disintegrated skin. The words, "*previously disintegrated*," appear in every such claim because, *not having shown any disintegrating means*, Beekhuis was not entitled to make any such means an element of any of his claims.

The fact, that said Beekhuis patent contains no claim calling for such a "*skin disintegrating means*" or "*lye-tank*," as an element thereof, will be hereafter referred to when we discuss the excuse given herein by the inventor, S. J. Dunkley, and by his son, Melville Dunkley, for testifying in this case that the first model machine, embodying the Dunkley invention, was made in 1902, notwithstanding the fact that in February, 1910, *they both testified, in an interference proceeding between said Beekhuis patent and the then pending application, upon which the Dunkley patent was afterwards granted, that said model was made in 1903.*

The Beekhuis means for removing the *previously* disintegrated skin, consists of a flat screen mounted on spring arms and adapted to be moved back and forth with a jerky, shaking movement which has the effect of not only agitating, shaking and dancing the peaches fed on to the surface thereof, but of advancing the peaches from the feed end to the discharge end of such shaker device. Above and below such shaker screen, are located perforated water pipes from which issues water under pressure and in the form of jets or spray, for spraying the peaches on the screen, and thereby removing the previously disintegrated skin.

The said Beekhuis patent was applied for on May 25, 1904, *more than six months prior to Dunkley's application date, which was November 29, 1904.* In paragraph 17 of defendant's answer (R. 13), it is

pleaded that Beekhuis was the original and first inventor of said Dunkley invention. Under the authorities above referred to, Beekhuis is conclusively presumed to have made his invention at least as early as the said date of his application. Therefore, by introducing in evidence the Beekhuis patent, defendant proved he made the invention, disclosed therein, more than six months prior to the date of Dunkley's application, thus destroying the prima facie validity of the Dunkley patent in respect to those claims thereof covering alone and separately the "*skin removing means*," and making it necessary for plaintiff to attempt to prove that Dunkley made his invention, comprising said means, prior to May 25, 1904. In the absence of any such proof on the part of plaintiff, the Court necessarily would be compelled to adjudge Beekhuis the prior inventor and the Dunkley patent therefore invalid in respect to such claims thereof. In view of the foregoing, it is obvious that, upon the introduction in evidence of the Beekhuis patent, the burden of proof shifted to the plaintiff to prove Dunkley made his invention, comprising said skin removing means, prior to May 25, 1904, *and there is no presumption of law or of fact that Dunkley did make such invention prior to May 25, 1904, or at any other time prior to November 29, 1904, the filing date of his application.*

In attempting to carry Dunkley's date of invention back of the Beekhuis filing date, it is evident that

plaintiff is attempting to invalidate the Beekhuis patent, which is also *prima facie* valid. This fact merely emphasizes the proposition, heretofore stated, that plaintiff's proof of Dunkley's date of invention and defendant's proof of Grier's date of invention must be tested by the same rules, must be viewed from the same standpoint and must be given equal consideration, each standing or falling on its own intrinsic merits, unsupported and unfortified by any presumption of law or of fact. The old saying that "*What is sauce for the goose, is sauce for the gander*" is particularly pertinent to a consideration of such proofs of plaintiff and of defendant.

We have heretofore referred to the testimony of the inventor, Samuel J. Dunkley, and of his son, Melville Dunkley, in the interference proceeding between the Beekhuis patent and the then pending application for the Dunkley patent in suit. It will be necessary to consider the nature of said interference, because such testimony therein is inconsistent with and contradicts their testimony in this case in respect to the most vital point of the whole history of the Dunkley invention, to wit: *the date of the building of the first model machine embodying the Dunkley invention*. Furthermore, the facts of said interference proceeding are significant in respect to plaintiff's theories as to the mode of operation of the Dunkley machine.

By referring to the file wrapper of the Dunkley patent, defendant's exhibit "B" (R. 759) and to paper

13 thereof (R. 822), it will be seen that on December 8, 1908, more than four years after the filing of the Dunkley application on November 29, 1904, Dunkley amended his application by inserting therein claims 14, 15, 16, 18, 19, 20, 21, 22, 23 and 24 of the Beekhuis patent, which had been previously issued on September 3, 1907. As a result of such belated amendment, the said interference was declared by the patent office on July 13, 1909. (R. 831.) The issues or counts of the interference were finally narrowed down to the subject matter of the Beekhuis claims 16, 18, 19 and 20. The final outcome of such interference was a decision in Dunkley's favor by the Court of Appeals for the District of Columbia, and we, therefore, find repeated in the Dunkley patent, as claims 19, 20, 21 and 22 thereof, said claims 16, 18, 19 and 20 of the Beekhuis patent.

Said Dunkley claims, which are some of those involved in this suit, read as follows:

"19. In an apparatus for treating fruit such as peaches, means for removing *previously* disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position of the fruit on said support, and means for directing peeling water jets upon said fruit.

"20. In an apparatus for removing the *previously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit of means for directing a peeling water jet upon said fruit as it advances.

"21. In an apparatus for removing the *pre-*

viously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit as it advances.

"22. In an apparatus for removing the *previously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit from above and below as it advances."

The said decision, of the Court of Appeals for the District of Columbia in Dunkley's favor, in no way affects the situation in this case. The opinion of said Court was not offered in evidence, but was annexed to one of the briefs filed by plaintiff in the lower Court. It is, however, reported at page 267 of the Patent Office Gazette of May 6, 1913, and a copy thereof will be found at the end of this brief.

Said decision, on its face, shows that only one point was considered, to wit: Whether or not Dunkley was entitled to make claims calling for "*peeling jets*," in view of the fact that, in his application, as filed on November 29, 1904 (R. 762), and as prosecuted until after the time he saw the Beekhuis patent, Dunkley had not used the term "*peeling jet*" or "*peeling spray*" or any equivalent term, and was obviously emphasizing the fact that the *rotating brushes* and the *belt brush*, in his machine, were the *efficient means* for removing the disintegrated skin. Said decision shows that the Examiner of Interferences and the Commissioner of Patents each decided that Dunkley was

not entitled to claim the use of "*water jets*" as one of the means for removing the skin, because there was not, in his application, sufficient disclosure of such mode of operation.

As stated in said decision, but one issue was presented. Throughout the prosecution of such interference, the only real question considered or involved was whether or not Dunkley was entitled to insert, in his application, the Beekhuis patent claims calling for "*peeling jets*." Dunkley's story as to conceiving a "*brush machine*" in August, 1902, making drawings thereof in September, 1902, and making such a "*brush machine*" in July, 1903, was not attacked or even disputed; throughout said interference, said story was assumed to be true. In support of the foregoing statement, we shall go outside the record and quote from the brief filed by Messrs. Chappell and Earl, before the Commissioner of Patents, as follows:

"First, that Dunkley had produced his machine long before Beekhuis' conception. That has already been decided by the Examiner-of-Interferences and by the full membership of the Board of Examiners-in-Chief. *In fact it could not be decided otherwise without completely overruling the undisputed testimony.*"

From the foregoing quotation, it is apparent that the said story of Dunkley was "*undisputed*." In other words, Beekhuis' attorneys, throughout the interference proceeding, assumed the story of Dunkley to be

true in regard to his conceiving and making a "brush machine," but they contended that, in such "*brush machine*" the water spray was not *the* means for removing the disintegrated skin or peel. In that regard, it is to be noted that the Court of Appeals for the District of Columbia expressly decided that, in the Dunkley machine, the water spray or jets were not *the* means or *only* means of removing the skin, but that the same merely co-operated with the brushes in performing such function. On such point, that Court states:

"But let it be conceded that Dunkley was not fully aware of the effective action of the jets of water and *relied chiefly upon the action of the brushes to remove the skin*; and on the other hand that Beekhuis relied chiefly on the water jets, yet the latter, as we have seen, relied upon the friction of the peaches with each other and the screen to assist in removing the skins, while the water jets had the additional function of cooling and washing the fruit. It is to be observed that none of the counts define the water jets as constituting the *sole* peeling means. The counts of the issue are satisfied by a construction in which peeling water jets *enter into the operation of removing the skins* whether they be exclusively employed to remove the skins or not. *And in neither machine as described and constructed are the water-jets shown to be the exclusive means of peeling.*"

The gist of said decision is, therefore, that the term "*water spray*," as used in the Dunkley application as originally filed, and the term "*water jets*" as used in

the Beekhuis patent, are deemed equivalent expressions; that the "*spray*," striking the peaches in the Dunkley machine, will necessarily assist in removing the skin in view of the fact that such skin has been disintegrated by the hot solution of lye, "*that is to say, cut or broken and loosened from the pulp*"; and, finally, that if such spray assists *to any extent*, in so removing the skin, *even though the brushes be chiefly relied on to perform such function*, the spray may be termed a "*peeling spray*," or, as Beekhuis called it, "*peeling jets*," and, therefore, Dunkley was entitled to insert in his application by amendment thereof, claims calling for "*peeling jets*."

In view of said decision so construing the expression "*peeling jets*" in the claims thereby allowed to be inserted in the Dunkley application, plaintiff is estopped from giving to such expression any different meaning and is estopped from asserting that the Dunkley machine, *as described and claimed in the Dunkley patent*, is one in which the peeling is done by water spray or jets and *not* by the joint action of brushes and such spray.

We have dwelt at some length upon said decision in view of the persistent and consistent efforts of opposing counsel to impress the lower Court with the idea that defendant was asking such Court to render a decision inconsistent with the findings of said Court of Appeals of the District of Columbia in regards to any matter *in dispute* before that Court. As stated

before, the story of Dunkley regarding the history of his "brush machine," *as such*, was not in dispute before that Court, and that Court was not called on to pass on the truth or falsity of said story. The truth thereof was assumed and not attacked by Beekhuis, whereas, we deny it to be true and, notwithstanding the decision of the lower Court herein, but with all due respect to that Court, *we are of the opinion that we have demonstrated said story to be false from beginning to end in respect to all the vital and material parts thereof.*

Furthermore, the said decision of the Court of Appeals is not even *res adjudicata* as between the parties to the interference; it is not a final judgment of a Court of last resort; it is not binding on this Court and it is not binding on the defendant. Furthermore, it is not even persuasive as to any matters to be decided by this Court because the only point in *dispute*, passed on by said Court, has not been raised herein by defendant.

On this point, the remarks of Judge Hawley in *Wheaton v. Kendall*, 85 Fed., 670, are pertinent:

"The Commissioner based his opinion *exclusively* upon the ground of the relations between the parties. *There is not in either of the decisions any clear-cut finding of fact that Kendall, upon the evidence, was the first inventor.*

"The decisions in the patent office are not final. The statute (Section 4915) gives to a court of equity the power to decide between interfering patents, *without any exception or limitation.*"

Of course, the Beekhuis and Dunkley patents are "interfering patents," because Beekhuis claims 16, 18, 19 and 20 are respectively identical with Dunkley claims 19, 20, 21 and 22.

Section 142 of *Walker on Patents*, reads as follows:

"No decision of the Commissioner of Patents or the Court of Appeals of the District of Columbia, in any interference case, is pleadable as *res adjudicata* in any action in any court; but such a decision will be followed by all the courts, unless it is shown to be wrong, by evidence which puts the points beyond a reasonable doubt. Where such a decision is made between two or more applications, a patent is granted to the inventor decided to be first, and no patent is granted to either of the others. If it is made between *an application and a patent*, and is made in favor of the application, the Commissioner will grant a patent thereon, *but he cannot recall the patent already issued*. In such a case the rival inventors may litigate their interference controversy anew, on the equity side of any United States Circuit Court which has or can acquire jurisdiction of the parties. That kind of litigation constitutes the subject of the chapter on interfering patents; the thirteenth chapter of this book. *Or the question of priority between the two inventors may be litigated afresh in any infringement suit, brought by one of them against the other.*"

That part of the above quotation, reading as follows: "but such a decision will be followed by all the Courts, unless it is shown to be wrong, by evidence which puts the point beyond reasonable doubt," is not applicable to the issues of this case, because we are not

now questioning the correctness of such decision in regards to any disputed question therein passed on. Priority of invention was *not in dispute* before the Court of Appeals *in the sense* that it is *in dispute* in this case.

The use of two Grier machines in 1903 and the use of five of said machines in 1904, prior to Dunkley's filing date, has certainly been demonstrated by defendant's proofs herein. Therefore, by reason of such proofs, the burden of proof was shifted to the plaintiff.

Finally, plaintiff's attorney, in one of their briefs filed in the lower Court after the conclusion of the trial, admitted that the burden of proof was shifted to plaintiff. In such brief, Mr. Chappell said:

"When defendant offered its first proofs as to Vernon's Fresno structures, one of which was installed at Los Angeles, and after the testimony as to Grier, *the burden of proof shifted to plaintiff to show the development of Dunkley's invention prior to the date of the application for the patent in suit.*"

(c) *Quantum of Proof Required on Plaintiff's Behalf.*

As stated before, plaintiff's burden of proving Dunkley made his invention prior to the use of the Grier machines and prior to the date of Grier's invention, is precisely the same burden that was, in the first instance, upon the defendant to prove such Grier use and such Grier date of invention.

As stated in the case of *Dey Time Register Co. v. W.*

H. Bundy Recording Co., 178 Fed., 818, by the Circuit Court of Appeals for the Second Circuit, speaking through Circuit Judge LaCombe, Circuit Judges Coxe and Noyes, concurring:

"The defendant having antedated the filing of the application by record evidence so convincing that it stands conceded, the burden is upon complainant to carry the date of invention still further back by evidence *that convinces beyond any reasonable doubt*.

"The complainant's patent antedating the defendant's, it was incumbent upon them to prove beyond a reasonable doubt that theirs was the prior invention. This they have done by proof so positive that the complainant's counsel conceded on the argument that the date of their invention was January 15, 1877, eleven months prior to the filing of the complainant's application. *This date being fixed, the burden was transferred to the complainant to satisfy the court by proof as convincing as that required of the defendant that his invention preceded theirs.* The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required *which does not admit of reasonable doubt.* *Thayer v. Hart* (C. C.), 20 Fed., 693.

"There is nothing in this case to suggest any fabrication or attempted coloring, but the human memory for dates is often inexact, and *it is a fair rule which lays the same burden on either side which seeks to antedate an occurrence the time of which is established by a trustworthy record.* There is no proof that any records of complainant have been lost by fire or other mischance, and, since none are produced to corroborate the contention that it had perfected the automatic ribbon

shifter earlier than September 12, 1904, we are of the opinion that the defense of prior public use by someone other than the inventor is established."

In the case of *Wheaton v. Kendall*, 85 Fed., 672, Judge Hawley, sitting in the Circuit Court for the Northern District of California, said:

"In *Thayer v. Hart*, 20 Fed., 693, the court held that, when the defendant in an infringement suit proves that he invented the patented device before the date of the plaintiff's application, the burden is transferred to the plaintiff to satisfy the court *beyond a reasonable doubt* that he first conceived the invention. In the course of the opinion, Judge Coxe said:

"*'The evidence of prior invention is usually entirely within the control of the party asserting it, and so wide is the opportunity for deception, artifice, or mistake, that the authorities are almost unanimous in holding that it must be established by proof clear, positive and unequivocal. Nothing must be left to speculation or conjecture,' and cited several authorities in support of his position.*"

We believe that the record facts herein demonstrate that the foregoing rule, requiring plaintiff to anticipate the anticipations of the Dunkley patent by proving, *beyond a reasonable doubt*, an earlier date for the making of the Dunkley invention, must have been overlooked by the lower Court. Plaintiff's proofs, on that phase of the case, will be hereafter analyzed in detail. However, it may be said, at this time, that such proofs consist of the testimony of three witnesses

regarding transactions occurring more than twelve years prior to the trial, and two of said witnesses, Samuel J. Dunkley, and his son, Melville Dunkley, were highly interested in the outcome of the litigation; that the said testimony of the two Dunkleys is inconsistent with and contradicted by their former testimony in the Dunkley-Beekhuis interference proceeding in respect to the most vital feature thereof, to wit, the year in which was built the first model machine embodying the Dunkley invention; that said Dunkleys are unable to remember or deliberately refuse to state most of the vital facts connected with the history of the Dunkley invention, thereby preventing or attempting to prevent their story being checked up by any independent investigation of the truth thereof; that the only documentary evidence, offered in corroboration of said testimony, is a letter which, on its face, refers to nothing and proves nothing material or relevant to any of the issues herein; that said testimony is inconsistent with ordinary human conduct; and, finally, said testimony is contradicted by the testimony of three disinterested witnesses in respect to the most vital features thereof, to wit: the respective dates of the building of the first Dunkley model machine and of the first Dunkley commercial machine.

It is quite certain that no Court in the land has ever declared a patent anticipated and void on any such insufficient, inconsistent, conflicting and contradicted proofs as are relied on herein by plaintiff to

prove the anticipating date of the Dunkley invention, yet the rules, controlling the amount of and nature of such proofs in support of either issue, are precisely the same.

In view of the lower Court's adverse decision herein, the foregoing statements may appear, at this time, to be most extravagant. However, we feel most confident that the same will appear to this Court, after its consideration of the record, to be thereby amply justified.

3. DEFENSE THAT NOT DUNKLEY BUT GRIER ORIGINAL AND FIRST INVENTOR.

(a) *Defense Based on Statute.*

Section 4920 of the Revised Statutes provides, among other things, that:

"In any action for infringement, the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial one or more of the following special matters:

"Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same. . . .

"Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented. . . .

"And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state . . . the names and residences of the persons alleged to have invented

or to have the prior knowledge of the thing patented . . . ; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement, and proofs of the same may be given upon like notice in the answer of the defendant and with the like effect."

In paragraph 19 of the answer herein (R.15) it is pleaded that Dunkley was not the original and first inventor, but, on the contrary, G. E. Grier, of Pasadena, California, was the original and first inventor, and Dunkley surreptitiously and unjustly obtained his patent for that which was in fact first invented by the said Grier, who, at all times, was using reasonable diligence in adapting and perfecting the same.

On this point, it is said in Robinson on Patents, at page 150:

"Sec. 961. Third Defense: Denial That the Alleged Inventor Was the First Inventor of the Patented Art or Instrument.

"The third defense consists in a denial that the patentee or his assignor performed the inventive act producing the alleged invention at *an earlier date* than any other inventors in this country. This defense concedes that the patentee or his assignor is a true inventor of the art or article in question, but denies that he was its first inventor. It is equivalent to either one of two averments: (1) *That rival inventors had completely conceived the idea of means embodied in the invention, and were using due diligence in reducing it to practice at*

the time when the patentee or his assignor conceived the same idea; or (2) that although the patentee or his assignor had first conceived the idea he did not use due diligence in reducing it to practice, and that in the meantime some later conceiver but more prompt reducer had perfected the invention. This defense raises the same issue which is presented in interference cases in the Patent Office and in proceedings in equity to annul a rival patent, and is sustained when the evidence establishes either one of its equivalent averments."

It will be noted that the *date of conception* of the rival and alleged earlier inventor is expressly stated to be one of the elements to be proved in proving him to be such earlier inventor. In other words, a defendant is entitled to carry a rival inventor's *date of invention* back to his *date of conception*, provided defendant can prove due diligence was exercised by such inventor in reducing his invention to practice after having conceived the same.

In Walker on Patents, it is said, among other things:

"Sec. 440. The defenses which are pleadable in bar to an action are very numerous in the patent law, and most of them are peculiar to this branch of jurisprudence. Where the facts appear to warrant so doing, a defendant may plead:

"8. That the patentee surreptitiously or unjustly obtained the patent for that which was in fact the invention of another, who was using reasonable diligence in adapting and perfecting the same . . .

"Sec. 451. The eighth defense may be made either by the general issue accompanied by notice or by special plea. *It applies to cases where another than the patentee preceded him in the first conception of the patented thing, but did not precede him in adapting it to actual use.* If that other stopped with that conception, the validity of the patent is not affected thereby, but if he used reasonable diligence in adapting and perfecting invention so conceived, no subsequent inventor can have a valid patent, surreptitiously or unjustly obtained by him for the same invention. Such a patent is surreptitiously obtained where the patentee appropriates the idea from the first conceiver, and, exceeding him in speed, reduces the invention to proper form, and secures the patent, while the first conceiver is diligently laboring to adapt the invention to use. *Such a patent is unjustly obtained, if it is issued to a subsequent inventor, when the first conceiver is using due diligence to reduce his invention to practice. Where this defense is pleaded all its elements must be incorporated in the plea.* The allegation of unjust or surreptitious obtaining of the patent must be accompanied by an allegation that the first conceiver was at the time using reasonable diligence in adapting and perfecting the invention."

It will be noted that the said defenses, set up in paragraph 19 of the answer, provide against three possible contingencies, to wit:

1st. If Grier first conceived and first reduced to practice, he is, of course, the first inventor without regard to the question of diligence, and in such case the Dunkley patent is void.

2nd. If Grier first conceived but was second in

reducing to practice, he is still the first inventor, provided he used reasonable diligence in reducing to practice, and in such case the Dunkley patent is void.

3rd. If Grier was the second to conceive but the first to reduce to practice, he is still the first inventor, provided Dunkley did not use reasonable diligence in reducing to practice, and in such case the Dunkley patent is void.

“First Inventor. The first inventor is the one who first has a mental conception of the invention, provided he exercises diligence thereafter in adapting and perfecting it, but as against a rival claimant who first reduces the invention to practice the burden is upon the first conceiver to show diligence. The party first to reduce to practice is *prima facie* the first inventor, but the man who first conceives and in a mental sense first invents a machine, art or composition of matter may date his particular invention back to the time of its conception, if he connects the conception with its reduction to practice by reasonable diligence on his part so that they are substantially one continuous act.”

30 Cyc., 873.

(b) *Conception—Proof of.*

In the case of *Philadelphia and Trenton Railroad Co. v. Stimpson*, 39 U. S., 461, the Supreme Court said:

“The next exception is to the admission of the evidence of William A. Stimpson, Richard Caton

and George Neilson, as to certain declarations and statements, and conversations of the plaintiff, as to his invention, prior to the date of his original patent, in order to rebut the evidence of the defendants, as to the invention or use by other persons of the same contrivance, before that date. The objection is that, upon general principles, the declarations and conversations of a plaintiff are not admissible evidence in favor of his own rights. As a general rule, this is undoubtedly true. It is, however, but a general rule, and admits and requires various exceptions. There are many cases in which a party may show his declarations comport with acts in his own favor, as a part of the *res gestae*. There are other cases, again, in which his material declarations have been admitted. Thus, for example, in the case of an action for an assault and battery and wounding, it has been held that the declarations of the plaintiff, as to his internal pains, aches, injuries and symptoms, to the physician called to prescribe for him, are admissible for the purpose of showing the nature and extent of the injuries done to him. See 1 *Phillips on Evid.*, ch. 12, Sec. 1, p. 200-2 (8th ed., 1838). In many cases of inventions it is hardly possible, in any other manner, to ascertain the precise time and exact origin of the particular invention. The invention itself is an intellectual process or operation; and, like all other expressions of thought, can in many cases scarcely be made known, except by speech. The invention may be consummated and perfect, and may be susceptible of complete description in words, a month or even a year before it can be embodied in any visible form, machine or composition of matter. It might take a year to construct a steamboat, after the inventor had completely mastered all the details of his invention, and had fully explained them to all the various artisans whom he might employ

to construct the different parts of the machinery. And yet from those very details and explanations another ingenious mechanic might be able to construct the whole apparatus, and assume to himself the priority of the invention. The conversations and declarations of a patentee, *merely affirming that, at some former period, he invented that particular machine, might well be objected to.* But his conversations and declarations, stating that he had made an invention, and describing its details and explaining its operations, are properly to be deemed an assertion of his right, at that time, as an inventor, to the extent of the facts and details which he then makes known, although not of their existence at an antecedent time. In short, such conversation and declarations, coupled with a description of the nature and objects of the invention, are to be deemed a part of the *res gestae*; and legitimate evidence that the invention was then known to and claimed by him, and thus its origin may be fixed, at least, as early as that period. This view of the subject covers all the parts of the testimony of the witnesses objected to in the Circuit Court, and we are of opinion that the court were right in admitting the evidence."

If the conception of a patentee inventor can be proved by other persons testifying as to his oral disclosures to them of his invention, it is quite certain that the patentee himself is a competent witness to also testify to such oral disclosures. Furthermore, if the conception of a patentee inventor can be so proved, the conception of any inventor can be similarly proved as the law makes no distinction between the two.

Paragraphs 2 and 4 of Section 4920 of the Re-

vised Statutes, as construed by Robinson and Walker and many other authorities, entitle any inventor, *whether a patentee or not*, to carry his date of invention back to his date of conception, provided he used "reasonable diligence in adapting and perfecting the same," or, in other words, in reducing it to practice. The fact, whether or not a man is a *first inventor* does not depend upon the fact that, after reducing his invention to practice and disclosing it to the public, he does or does not apply for a patent thereon. Any inventor has a right to dedicate his invention to the public if he so desires, and the public obviously is benefited more by such a dedication than by having the inventor monopolize such invention for seventeen years by means of a patent. Therefore, it is obvious that an inventor, who patents his invention, is not entitled to more consideration than the inventor who discloses and dedicates his invention to the public without receiving, in consideration of such disclosure, a seventeen years' monopoly, or any consideration other than the public's gratitude. It is a common thing for scientists and men of the medical profession to dedicate their inventions to the public. In the case of a controversy between such a scientist, who has disclosed and dedicated his invention to the public, and a man who has secured a patent thereon, what a travesty on justice it would be for the law to prevent the scientist from carrying his date of invention back to his conception date and yet allow the patentee to

do that very thing because he preferred to secure a seventeen years' monopoly thereof in consideration of disclosing it to the public instead of disclosing it gratis!

"It is the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public, and this he may do either by express declaration or by conduct equally significant with language—such, for instance, as an acquiescence with full knowledge in the use of his invention by others."

Kendall et al. v. Winsor, 62 U. S., 329.

"It has not been, and, indeed, cannot be, denied that an inventor may abandon his invention, and surrender or dedicate it to the public. This inchoate right, thus gone, cannot afterwards be resumed at his pleasure, for when gifts are once made to the public in this way they become absolute."

Shaw v. Cooper, 32 U. S., 317.

If the first inventor has the right to disclose and dedicate his invention to the public, no subsequent inventor, merely by applying for a patent, can deprive him of such right or the public of the free use of such invention. Therefore, the first inventor is he who first conceives and, with diligence, reduces to practice, and no act of any subsequent inventor can possibly alter or affect the situation or deprive the first inventor of the right to date his invention from his date of conception.

As said by the Circuit Court of Appeals for the First Circuit, in *Automatic Weighing Machine Co. v. Pneumatic Scale Corporation, supra*:

"The law appears to be well established that a conception evidenced by disclosure, drawings, and even a model, confers no rights upon an inventor unless followed by some other act, such as actual reduction to practice, or filing an application for a patent. A conception of this character is not a complete invention under the patent laws. It may constitute an invention in a popular sense, but it does not make the inventor the 'original and first inventor' under the statutes. If it did constitute an invention under the statutes, then an inventor might stop with his drawings and disclosure, and hold the field for all time against a subsequent inventor *who has reduced his invention to practice, or who has obtained a patent*. The law will not permit this. An inventor must not stop with this stage of his invention, but he must proceed with reasonable diligence to perfect his invention, *either by actual reduction to practice, or by filing his application for a patent*.

"This rule of the patent law is both reasonable and just. *It secures to the first conceiver the right to his invention*. It is not uncommon for two persons to conceive an improvement in an existing device about the same time, and *all the law exacts of the first conceiver in order to protect him in his right to the invention is that he shall proceed with reasonable diligence to reduce the invention to practice, or to file an application for a patent in conformity with the statutes.*"

On page 7 of his brief, filed in the lower Court, opposing counsel, Mr. Chappell, said:

"In digesting this Supreme Court decision, *Webster Loom Co. v. Higgins, Macomber on Patents* says at p. 736:

"Sec. 812. Miscellaneous Holdings (Priority).

"'When defendant claims to have invented the device in suit, *not having made an application for a patent*, the right of complainant to his patent is not disturbed even by priority of invention by the defendant *unless he could show more than two years' public use prior to plaintiff's application.*'

"An analysis of the decision *seems* to support this paragraph of Macomber's digest, and it is of importance here in the consideration of Grier's testimony, because Grier did not apply for a patent. The only thing of consequence, so far as Grier is concerned, would be the complete articles in use prior to the date of Dunkley's invention, unless, forsooth, he showed two years' public use before Dunkley's application, when it would not of course be material whether he was before or after Dunkley's invention."

The weak and tentative manner in which Mr. Chappell *indirectly* through Macomber, suggests the said Supreme Court decision as an authority *seemingly* in his favor, is, in itself, enough to condemn the same. It is obvious that opposing counsel prefers that Macomber should shoulder the burden of citing said decision in support of the absurd doctrine contended for. According to the quotation, the defense of *priority of invention*, by one not an applicant for a patent, cannot be maintained unless coupled with proof of two years'

prior public use of the invention in controversy. As two years' public use, prior to the application, alone is sufficient to invalidate the patent, nothing could be gained by adding to proof of such use any proof as to the identity of the party who invented the thing so publicly used. In other words, it is contended that one defense cannot be successfully maintained without proof of another defense which, by itself and alone, is sufficient in law as a complete defense! However, the decision in the case of *Webster Loom Co. v. Higgins*, 105 U. S., 580, does not announce any such doctrine, but, on the contrary, supports our contentions. In that case, one of the questions involved was whether or not Webster, the patentee, or one Davis, was the prior inventor. The Supreme Court said:

"On this point we think it very clearly made out, though we shall not go into much detail in commenting upon the evidence, that the whole substance of the invention was conceived by Webster and exhibited by him in a drawing as early as the winter of 1865-66, long before Davis entertained any idea of it. The original of this drawing is in existence, and was produced in evidence, and is well authenticated. . . .

"It is contended by the defendants that Davis had conceived the idea of using a rigid lathe with his wire bar in the early part of 1868, and that, in the model which he prepared at that time for obtaining his patent, he exhibited the same latch devised by Webster, and operated in the same way by contact with the wire-box; and that he showed to the witness Crossley, by pinning his sliding shuttle-box fast to the lathe, how it could be used

with a rigid lathe and shuttle-box. . . . But, if it were true that he did show these things in his model, and had he shown a trough instead of parallel bars; and if it were true that he regarded the idea as anything more than a possibility; and that he did, in fact, contemplate it as a perfected and practicable arrangement, so as to amount to invention,—the question would still remain whether he or Webster was the first inventor. Both may have been original inventors, but only one of them could be the first. If Davis had put the invention into practical form and operation more than two years before Webster applied for his patent, then the patent would be void by reason of prior use. *But the evidence is conclusive that he never undertook to put it into practical form until he made the Sterling loom, which was only commenced in 1870.* Webster's application for his patent was made in June, 1870. . . . *The defense of prior use for two years, therefore, is not sustained; and the question comes back to simple priority of invention.* Conceding that Davis was an original inventor, *the earliest point of time that he can be regarded as such was in the spring of 1868.* But Webster had invented it before that time, and had made a drawing of it which, in March, 1868, he exhibited and explained to Davis. An invention relating to machinery may be exhibited either in a drawing or a model, so as to lay the foundation for a claim to priority, if it be sufficiently plain to enable those skilled in the art to understand it.

. . .

“There is a great deal of evidence *pro* and *con* to which we have not adverted. It must suffice to say that we are satisfied from the examination we have given to it that Webster is entitled to the claim of being the first inventor.”

It will be noted that, before passing on the question of *priority of invention*, the Court finds that the defense of *two years' public use* is not sustained. That defense is thereupon eliminated entirely from the case. It is nowhere considered by the Court as having any relation to or bearing on the defense of *priority of invention*. The two defenses are treated as entirely distinct and separate and there is no suggestion, hint or intimation that the defense of *priority of invention* in any way depends upon proof of the defense of two years' public use. Having disposed of the defense of two years' public use, the Court says: "* * * *the question comes back to simple priority of invention.*"

In then discussing said defense of *priority of invention*, it will be noted that the Court expressly and specifically accords to Davis, *as his date of invention, the date of his conception*, to wit, the spring of 1868, notwithstanding the Court expressly finds he did not reduce it to practice until 1870. The Court then finds that Webster made the invention before the spring of 1868.

From the foregoing, it is apparent that said Supreme Court decision fully and completely supports our contention and is in exact harmony with all the other authorities cited by us. In view of said authorities, Grier's date of invention was his date of conception, and, therefore, defendant was entitled to prove said date of conception in the manner set forth by the Supreme Court in the case of *Philadelphia Co. v. Stimpson, supra*.

(c) *Diligence.*

The question of diligence never arises in a case where the first conceiver is the first to reduce to practice.

“This question of diligence in reduction to practice is never raised *except in cases where the later inventor has anticipated the earlier in the embodiment of the idea of means.* A sole inventor may occupy what time he pleases in expressing his conception in tangible materials, still, as from him alone the public must receive the benefit of the invention, to him alone belongs the recompense of the inventor, whatever delays may have occurred in its disclosure. For the same reason, if the first conceiver is also the first reducer, it is from him that the complete invention first proceeds, however slowly it has been developed in his hands; and no subsequent conceiver and reducer of the same invention can claim to have conferred upon the public any new instrument or operation.”

At this point we desire to call the Court's attention to its decision in the case of *Wilson & Willard Mfg. Co. et al. v. Bole et al.*, 227 Fed., 607. In that case, the question of priority of invention was involved so that we find therein a situation similar to the one presented herein by the defense of prior invention by Grier. In the Wilson case, this Court, speaking through Judge Rudkin, said:

“The principal question in the case is the single one: Who was the inventor of the device in question, and therefore entitled to the patent? This, of course, is largely a question of fact. . . .

"The fact that the trial court decreed in favor of the appellees on conflicting testimony is entitled to consideration; but if this court is convinced that the decree is erroneous, after giving due weight and consideration to the superior advantages possessed by the trial court, a reversal must follow."

After a detailed consideration of the testimony and proofs therein, the lower Court's decree in said case was ordered reversed.

IV.

ANALYSIS OF PROOFS RELATIVE TO THE HISTORY OF THE DUNKLEY INVENTION.

Before discussing the defenses of prior invention and of prior use by G. E. Grier, of Pasadena, California, we think it advisable to acquaint the Court with the history of the Dunkley invention. In order that the Court may appreciate the significance of and the bearing on the issues herein of the various respective dates attributed by the witnesses to the several occurrences constituting such history, we shall now briefly outline the salient facts constituting the history of the Grier invention which, as stated before, is admitted by plaintiff to be substantially identical with the Dunkley invention.

During the months of August and September, in the peach season of 1902, at Pasadena, California, G. E. Grier conceived and described to others the so-called Grier machine, which is shown in the eight

photographs thereof at pages 27 to 34, inclusive, of the Record herein. During April, 1903, the building of two of said machines was commenced and the same were completed in July, 1903. One of these was put into commercial operation in July, 1903, by the Pasadena Canning Co., and the other, at least as early as August 3, 1903, was put into commercial operation by the Eastside Canning Co. of Los Angeles. Said photographs are photographs of the Eastside Canning Co's machine. The lower Court's opinion apparently gives full credence to the proofs establishing the foregoing facts.

The foregoing history of the Grier invention having been established, at the trial, beyond a reasonable doubt, plaintiff proceeded to attempt to anticipate the said respective dates of Grier's conception, disclosure to others and reduction to practice of the Grier machine by proving the dates of Dunkley's corresponding activities. Of course, under the well established rule of law heretofore referred to, *the burden was on plaintiff to prove said activities and the respective dates thereof, beyond a reasonable doubt.*

Samuel J. Dunkley, the applicant for the Dunkley patent, is a resident of Kalamazoo, Michigan. During the years 1902, 1903 and 1904, and also before and after said period, his company, the Dunkley Canning Company, operated canning establishments at Kalamazoo and South Haven, the latter a small town near Kalamazoo and on the shore of Lake Michigan.

In order that the Court may better understand and appreciate our attack on plaintiff's proofs relating to the history of the Dunkley invention, we first shall outline briefly what we contend to be the *true* history of the events occurring in the Dunkley Company's respective establishments at South Haven and Kalamazoo, during the years 1902, 1903 and 1904. At sometime, in such period, the first Dunkley model peeling machine and the first Dunkley commercial machine were built.

OUTLINE OF TRUE HISTORY OF DUNKLEY INVENTION.

During the year 1902, *at its South Haven cannery*, the Dunkley Company handled only peaches, a few pears and possibly a few berries. The pear season ran from about August 15th to September 10th and the peach season, as a rule, began in August and ran until about October 10th. *The pears were always peeled by hand* but the Dunkley Company never handled many pears as "Michigan has never been much of a pear State." During 1902, all of the peaches were peeled either with hand peeling knives or with the St. Claire-Scott rotary-knives peach parers. *There were a number of small peach peeling tables* about each of which the women sat peeling peaches. Each woman had her basket of fruit at her side and, in her lap, a pan into which she dropped the pits (Melville Dunkley, R., 420-5).

During the months of July and August, 1903, at the

South Haven cannery, Stewart Campbell (one of defendant's witnesses herein and, in 1903, Superintendent of the Dunkley's South Haven establishment), with some slight assistance from William A. Bruncker (another witness herein for defendant and, in 1903, an employee of the Dunkley Co.), built a peach peeling table about eighty feet long. During that year, 1903, *all the peaches, commercially peeled in such cannery, were peeled by hand or by the use of the St. Claire-Scott machines.* The women sat along either side of said long peeling table and, after peeling and pitting the peaches, placed the halves on the traveling belt running down the center of the table. This belt carried the peaches to the "filling" end of the table, where they were put in cans. The cans were then taken to the machine for putting syrup therein and afterwards taken to the seaming machines wherein tops were put on the cans. They were then carried on traveling chains or carriers through the cooker, consisting of a tank filled with hot water heated by steam coils.

During the month of August, 1903, Bruncker was put to work pickling peaches with the skin thereon. After about two weeks of this work, Samuel J. Dunkley told him he would like to have the peaches peeled before being pickled. He then suggested the use of the lye process for that purpose and said *he had heard of its use in 1902 at the McEwing Cannery in South Haven.* Bruncker thereafter experimented with the lye process and Dunkley, being satisfied with the experi-

ments, suggested the making of a machine for the purpose and stated he would get Campbell to make it. Campbell thereafter obtained the necessary information from Brunner regarding the lye process and proceeded to make the *first experimental model brush machine*, which was not completed *until sometime in October, 1903*, near the end of the peach season. It was then tested with a few peaches which were first subjected by Brunner to a lye solution heated in a pan on a coal oil stove in a room in the basement next to the engine room. *No lye tank was ever built for such experimental model machine*, the frame of which was offered in evidence as "Plaintiff's Exhibit No. 10" (R. 480), and of which frame a photograph was offered in evidence as "Defendant's Exhibit R" (Rec., 435). *Such model was never used commercially. It comprised only a single endless brush belt* for conveying the peaches between two cylindrical rotating brushes and perforated pipes arranged alongside thereof. As stated before, *no lye tank was built for said experimental model machine*.

Within a month or so after the first test of the experimental model machine in October, 1903, Campbell commenced work at *Kalamazoo* on the *first commercial peach-peeler* which contained *three endless brush belts*, each of which carried whole peaches between two rotary brushes. This commercial machine was completed and installed in the South Haven cannery during the month of August, 1904, and operated and

tested, *for the first time late in August, 1904.* On September 3, 1904, *before said machine was ever commercially used,* Campbell left the employ of the Dunkley Company (R., 541).

About three months after the completion and first test of such commercial machine, to wit, on November 29, 1904, Dunkley filed his application for a patent thereon. The drawings in said application, upon which was issued the Dunkley patent in suit, *were based on said commercial machine* (Melville Dunkley, R., 448).

Prior to November 1, 1904, only two peach peeling machines were built by the Dunkley Co., to wit: the experimental model one line machine and the first commercial machine, which was a three line machine, that is, a machine having three endless brush belts, each conveying the peaches, delivered thereon, between two rotating cylindrical brushes (M. Dunkley, R., 449; S. J. Dunkley, R., 501).

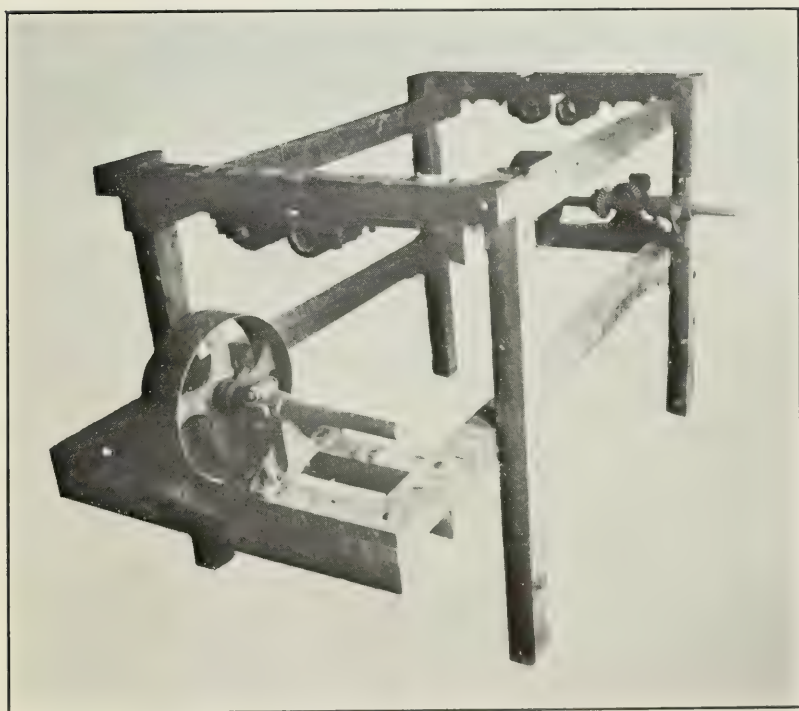
According to the foregoing outline, it will be noted that the Dunkley experimental model machine was not completed until October, 1903, more than two months after both the Grier machines had been put into regular commercial use in California; it is also to be noted that the first Dunkley commercial machine was not completed or tested until August, 1904, more than a year after the completion of and the regular commercial use of the two Grier machines in California.

DATE OF BUILDING OF DUNKLEY EXPERIMENTAL
MODEL MACHINE.

Obviously, the most vital fact in the history of the Dunkley invention is the date of the building of the first model machine embodying such invention. That date dominates the whole situation; it is the most material of all the facts necessary to be proved by plaintiff in order to anticipate the Grier anticipation. The inventor, S. J. Dunkley, contends that, *during the same month*, the invention was conceived and the model machine, Exhibit No. 10, was made (R., 479 and 495). Therefore, the date of construction of said model, for all practical purposes, fixes the date of the Dunkley invention.

If it be demonstrated that said model machine was not built until months after June 12, 1903, no weight whatever can be accorded to any of the testimony of the two Dunkleys and plaintiff's other witness, H. C. Schau, all of whom have testified herein that said model was built in 1902. If their testimony be false in respect to said material, and the most material, fact in plaintiff's case, then no credence, whatever, should be given to any of their testimony on less vital matters. To such a situation is applicable the maxim: "*Falsus in uno, falsus in omnibus.*"

The date, June 12, 1903, is above selected, because it is the date of a letter sent from New York to the Dunkley Company by William Brunker, one of de-



fendant's witnesses herein, in respect to his proposition to *thereafter* enter the Dunkley Company's employ to make fruit jams. Said letter was produced by plaintiff, during the cross-examination of Bruner, and appears at page 612 of the record. Soon after sending said letter, Bruner entered the Dunkley Company's employ at its South Haven cannery and remained there for only about four months (S. J. Dunkley, R. 506). Said period of about four months covers Bruner's whole connection with the Dunkley Company. Neither before nor after said period, was he ever at South Haven or in the Dunkley Company's employ. *The Dunkley experimental model machine was made while Bruner was at South Haven and he testified that he actually assisted in the building thereof and at the first test thereof in October, 1903.*

The wooden frame of said experimental model machine is in evidence as "Plaintiff's Exhibit No. 10" (R. 480). A photograph of said frame is in evidence as "Defendant's Exhibit R" (R. 435). A reproduction of the "Exhibit R" photograph appears on the opposite page. The frame, disclosed in such photograph, together with the brushes, spray-pipes, pulleys, gears, etc., mounted on said frame, constituted the whole experimental model. In other words, *no lye-tank was ever built for such model or embraced as a part thereof.* On this point, the patentee, S. J. Dunkley, herein said:

"Q. Was there a lye-tank built for this first experimental model machine?

"A. No." (R. 497.)

"Q. But you never built a lye-tank for this 'Plaintiff's Exhibit 10'?"

"A. For the experimental machine we never built a lye-tank." (R. 498.)

The alleged inventor of this peach peeling machine in controversy, certainly should know, if anyone knows, whether or not his first experimental machine embraced any lye-tank. He said it did not and his said testimony is absolutely true. *No lye-tank was ever built for or used as a part of said experimental model machine.*

In the interference proceeding between the Beekhuis patent and his then pending application, S. J. Dunkley, in answer to the questions asked by his attorney, F. L. Chappell, Esq., plaintiff's attorney herein, testified as follows regarding said model and the first commercial machine:

"MR. WHITE: In interference No. 30,610, between yourself and H. A. Beekhuis, did you, on February 15, 1910, make the following answers to the following questions propounded to you by Mr. F. L. Chappell, your attorney, to wit:

"'Q. 3. I call your attention to the counts in this interference, numbered 3, 4, 5 and 6, which are in the following language:

"'3. In an apparatus for treating fruit such as peaches, means for removing *previously* disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position

of the fruit on said support, and means for directing peeling water jets upon said fruit.

"4. In an apparatus for removing the *previously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing a peeling water jet upon said fruit as it advances.

"5. In an apparatus for removing the *previously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit as it advances.

"6. In an apparatus for removing the *previously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit from above and below as it advances,'

and ask you to carefully consider the said counts and state when you first conceived or thought of the structures that are recited and pointed out in these four counts?

"A. In the month of August, 1902.

"Q. 10. After conceiving of this invention in August, 1902, did you make any drawings? A. Yes, sir.

"Q. 11. When did you make the drawing, and what became of it? Are you able to produce it? A. I am not able to produce the drawing, which were pencil sketches.

"Q. 12. About when were these made, as near as you remember, and state definitely the reasons why you are not able to produce them. Indicate what became of them, in other words, as far as you know. A. As soon as I found the process was practical I made drawings right away and tried to get the matter in a concrete form, and, after I had gotten all my ideas together, I turned them over to the factory and let them put them together

and build a machine, and the machine from these drawings was built in the factory.

"Q. 13. What became of the drawings, so far as you know? A. They were turned over to M. E. Dunkley.

"Q. 14. Do you think they are in existence now? A. I couldn't say, but all the drawings that I made were generally pencil notations on any kind of paper, as I did not realize that they were of any particular value at that time.

"Q. 15. Then, as I understand you, you took no precaution to preserve them. Is that right? A. I did not, no.

"Q. 16. State whether a small model was made of the machine, or not, before a full-sized machine was made? A. Yes, there was.

"Q. 17. Kindly explain what this model was? A. This model was a one-line machine, a regular working machine.

"Q. 18. How large was it? A. In size or capacity?

"Q. 19. Both. A. Well, *it was a little over 5 or 6 feet long, about 3 feet wide* and had a capacity of from 100 bushels to 200 bushels of peaches per day.

"Q. 20. Where was this machine made and at about what time? A. *It was made in the month of July, 1903, and was put together at the factory at South Haven, Michigan.*

"Q. 21. Where was the machine used? A. *At South Haven, Michigan.*

"Q. 22. Was it used at any other place or places? A. *Not that year.*

"Q. 23. State what became of that machine, if you know? A. I think *it is over in the factory now.*

"Q. 24. Is it in working condition? A. I couldn't say as to that. The factory superintendent would know better than I would.

“Q. 25. I show you a photograph and ask you if you recognize the picture there photographed? A. Yes, this is the standard of the first machine.

“Q. 26. Is this machine one that you have described or is it a later machine? A. This is the one that I have just described.

“Q. 27. State whether there were any other machines made after this machine that you have just referred to as the model machine? A. Yes, sir; this was a one-line machine and the capacity wasn't large enough, so in September of 1903, we built the three line machine.

“Q. 28. Indicate the extent to which this *one-line* machine was used, so far as you know? A. We *first* tried it out on Georgia peaches and then worked it along until we got the *three-line* machine built, and some days the receipts of peaches were so heavy that we used both machines during that year. I don't think it was used the next year. That is referring to the small, what I call the model working machine.

“The photograph identified by the witness is offered in evidence with the request that it be marked Dunkley's machine No. 1, photograph of frame of first Dunkley machine, and the same is so received and marked.’

“Did you so testify at that time?

“A. I think I remember that well enough; yes, I testified to that.” (R. 485-489.)

It is to be noted that the four *counts* of the interference, to which Dunkley's attention was called, respectively, embrace *only* the “means for removing *previously* disintegrated skin.” In other words, no *lye-tank* or other disintegrating means is made an element of any one of said counts. *The device*, called for by

each of said counts, is one for removing skin that has been *previously* disintegrated.

It is also to be noted that Dunkley says *the model machine was made in July, 1903, and put together at the factory at South Haven*. He specifically states that "It was a little over 5 or 6 feet long, about 3 feet wide . . ." Plaintiff's Exhibit No. 10 is the wooden frame of said model and said frame is precisely 5 feet and $8\frac{7}{8}$ inches long and 3 feet and $\frac{5}{8}$ inches wide, thus showing that Dunkley, in his said answer, was referring *only* to said structure and to nothing else when he said it was built in July, 1903. In other words, when Dunkley stated that said model was built in July, 1903, he referred only to the wooden frame on which were mounted the belt brush, the rotating cylindrical brushes, the perforated pipes and the necessary pulleys and gearing for operating the brushes. Said frame, with said parts mounted thereon, was *a complete device* for removing skin that had been *previously* disintegrated and such a device was the *only* one described in any one of said counts. In his said answers, Dunkley did not include, as a part of said model, any lye-tank for the very good reason that no lye-tank was built in July, 1903, or at any other time for said model machine.

It is also to be noted that Dunkley, Sr., says that said model machine was "*first tried out on Georgia peaches.*" In other words, the *first* test of said machine, according to him, was with *Georgia peaches*.

According to Melville Dunkley, "Georgia peaches came into the market at Chicago, which is usually early in *July*" (R. 418), and the Michigan peach season began in August (R. 420). Therefore, in order to contend said model was first tried out in July, it was necessary for them to say said tryout was with Georgia peaches. However, the point we wish now to emphasize is that Dunkley, Sr. states, in said interference proceeding, that the "*first*" tryout of said model was in July, 1903. In other words, he not only said said model was made in July, 1903, but he also says it was *first tried out in July, 1903*.

Regarding the date of construction of said model, Melville Dunkley testified in said Interference, as follows:

"MR. WHITE: Q. Mr. Dunkley, in Interference No. 30,610 between Samuel J. Dunkley and H. A. Beekhuis, did you testify as follows regarding a photograph, a duplicate of which has been introduced in evidence as 'Defendant's Exhibit R', to wit:

" 'Q. 228. I show you a photograph and ask you if you are able to recognize the same and tell me what it is?

" 'A. Yes, sir. It is a photograph of the frame and some parts of the original machine *built during the summer of 1903*, about which I have just testified.'

"THE WITNESS—Yes." (R. 441.)

It appears, therefore, that both the Dunkleys testified, in 1910, six years before the trial of this case,

that the Dunkley model machine was made in 1903. It can safely be assumed that any witnesses, called in the interference proceedings to corroborate the Dunkleys, also testified that the said model was built in 1903. None of said witnesses were called to testify herein. In their place, the witness, H. C. Schau, *who had not previously gone on record under oath*, was called to corroborate the Dunkley's *new* story to the effect that the model was built in 1902.

In order to meet the exigencies of this case, *and six years after giving his former testimony in the interference proceeding*, S. J. Dunkley testifies herein that the model machine was made and *tested* in August, 1902!

"Q. When was this plaintiff's exhibit model *first tested*?

"A. The commercial machine or the experimental?

"Q. The experimental model.

"THE COURT—This, 'Exhibit No. 10' here.

"A. Sometime in August, 1902" (R. 495).

Of course, the Dunkleys had to give some kind of an excuse for such a remarkable change in their testimony regarding the most vital fact in plaintiff's case. The real reason for such change is not difficult to fathom. Defendant had proved, by an overwhelming mass of evidence, the commencement of the two Grier machines in April, 1903, and their completion and commercial operation in July, 1903. The construc-

tion by Dunkley in July, 1903, of merely a model was not sufficient to meet the Grier evidence. Plaintiff's case was therefore lost unless the Dunkleys resorted to extreme measures and carried back the date of construction of Dunkley's first machine. Hundreds of thousands of dollars were at stake and the Dunkleys rose to the occasion. The pretended reason for such change in their testimony will now be discussed. At this point we again wish to call the Court's attention to S. J. Dunkley's testimony on cross-examination to the effect that no lye-tank was ever built for the experimental model machine (R. 497-498). On re-direct examination, he testified as follows:

"MR. CHAPPELL: In view of the quotation from the interference record, 30,610, between yourself and Mr. Beekhuis, I will ask you to please consider the 'Plaintiff's Exhibit 10,' the framework here, and state explicitly and in detail what you know about the production of that machine and when the machine was finally completed. A. *That machine was completed some time in August, 1902.*

"MR. CHAPPELL: Q. I call your attention particularly to your answer to the question 20 in the interference record, 'It was made in the month of July, 1903, and put together in the factory at South Haven, Michigan,' and ask you if that statement is inconsistent with the one you have just made? A. This places it in July; I had the completed machine, the tank and everything in combination.

"MR. CHAPPELL: Q. Your answer as to 'Exhibit No. 10' does not contemplate the presence of the tank? A. No.

"MR. CHAPPELL: To what did you refer as a structure in 1902 in your answer? A. *Just the spray end of it.*" (R. 386-7.)

The excuse given by the witness for changing his testimony presents a most amazing situation. He says no lye-tank was ever built for the model Exhibit No. 10, yet he says his interference testimony referred to the completion, in July, 1903, of the combination of both the brush-spray-pipe mechanism of "Exhibit 10" *and a lye-tank therefor!*

Melville Dunkley also advances the same remarkable excuse for changing his testimony regarding the date when Exhibit 10 was built. He, like his father, testified in the interference proceeding, that it was built in July, 1903. *Neither of them in said proceeding, even suggested, intimated, or hinted that Exhibit 10 was built in 1902; neither of them, in said proceeding, suggested, intimated or hinted that any part of the model machine was built at any time prior to July, 1903. The testimony of both of them in said interference proceeding, clearly and unequivocally meant only one thing, to wit: that the wooden frame with the brush-spray mechanism mounted thereon constituted the experimental model and that said frame and parts thereon were built in 1903.*

We shall now show that the only Dunkley mechanism involved in said interference proceeding was that comprising the brush-spray-pipes mechanism, that is, *the skin-removing means.* In other words, a lye-tank

was not included as an element in any count in said interference, and, therefore, *it was absolutely immaterial in said interference, whether Dunkley ever built a lye-tank for his peeling machine or ever used one as a part thereof.* The Beekhuis patent, as stated before, does not disclose any lye-tank and a lye-tank is not made and could not be made an element in any claim in the Beekhuis patent. Therefore, it was impossible for the Patent Office to include, in any count of the said interference, a lye-tank. Every count of an interference must necessarily disclose a combination *common to both applications* in interference or *common to the application and patent in interference.* The very basis of an interference is that the *same thing* is disclosed by each of two applicants or by an applicant and by a patentee. As the Beekhuis patent does not disclose a lye-tank as a part of the Beekhuis peeling machine and as said patent does not claim a lye-tank as part of any combination therein claimed, there could be no interference between said patent and any Dunkley claim *including a lye-tank* as an element thereof.

The counts of said interference are recited, in Question No. 3, asked Dunkley in said interference, by his attorney Mr. Chappell, and previously quoted herein.

It will be noted that a lye-tank is not made an element of any of said counts. In order to show that Mr. Dunkley's attorney, Mr. Chappell, fully appreciated said fact and, therefore, fully appreciated that

Dunkley's proof need only involve matters pertaining to the brush-spray-pipe mechanism, we shall go outside the record herein and quote as follows from Mr. Chappell's brief filed in said interference:

"The issues of the interference are in the following language, numbered and *itemized into elements*:

Issue No. 1.

"1. In an apparatus for treating fruit such as peaches, means for removing *previously disintegrated* skin from the fruit, including

- (1) A support for the fruit,
- (2) Means for effecting a change of position of the fruit on said support, and
- (3) Means for directing peeling water jets upon said fruit.

Issue No. 2.

"2. In an apparatus for removing the *previously disintegrated* skin from fruit, the combination with,

- (1) Means for supporting and advancing the fruit, of
- (2) Means for directing a peeling water jet upon said fruit as it advances.

Issue No. 3.

"3. In an apparatus for removing the *previously disintegrated* skin from fruit, the combination with

- (1) Means for supporting and advancing the fruit, of
- (2) Means for directing peeling jets of water at intervals upon said fruit as it advances.

Issue No. 4.

- "4. In an apparatus for removing the *previously disintegrated* skin from fruit, the combination with
- (1) Means for supporting and advancing the fruit, of
 - (2) Means for directing peeling jets of water at intervals upon the said fruit
 - (a) from above and below as it advances."

It will be noted that Mr. Chappell fully understood the obvious fact that not one of these counts included, as an element thereof, any lye-tank or any other means for disintegrating the skin. Each count specifically calls for mechanism for removing the *previously disintegrated skin*. So far as concerns any of the structures, respectively covered by said four counts, the skin might be disintegrated by any means located at any place miles away from said structures and in no way combined therewith.

That the foregoing situation was fully appreciated is also shown by the following quotation from Dunkley's communication to the Patent Office under date of Feb. 5th, 1913, and found in the Dunkley File Wrapper (R. 836):

"The water peeling means here shown are available wherever the skin of the fruit or vegetables has been suitably disintegrated or loosened. The particular alkaline treatment is highly effective, but I am sure that this may be accomplished otherwise and clearly when the skin of fruit or vegetables is disintegrated the spray means shown will do the work of peeling the same.

"I desire, therefore, to claim the means to remove the disintegrated peel, *no matter how the disintegration is accomplished.*"

Rule 110 of the Patent Office reads as follows:

"Each party to the interference will be required to file a concise preliminary statement, under oath, on or before a date to be fixed by the office, showing the following facts:

(1) The date of the original conception of the invention set forth in the declaration of interference.

(2) The date upon which a drawing of the invention was made.

(3) The date upon which the invention was first disclosed to others.

(4) The date of the reduction to practice of the invention.

(5) A statement showing the extent of use of the invention.

(6) . . ."

It will be seen, therefore, that such a preliminary statement is, in effect, a pleading, under oath, setting forth all the ultimate facts relied on. The proofs, in the interference, must be consistent with such statement.

In his oral argument in the lower Court, plaintiff's attorney, Mr. Miller, stated:

"Now, the evidence that has been produced in that case (Beekhuis-Dunkley Interference) is the *same evidence* that has been produced here, evidence as to the date of Mr. Dunkley's conception, the date of Mr. Dunkley's application or reduc-

tion to practice, the building of his machine, and his application for a patent, including this big machine over here, this model, which was made in the fall of 1902. There is a judicial determination by the Court of last resort upon these facts, and *the finding of facts in that matter shows that this model was made in the fall of 1902, but without a lye-tank; that in the spring of 1903, the lye-tank was bought, and that in the peach season of 1903 the lye-tank was coupled up with this machine, and that this machine was put to use in actual peeling of peaches in 1903 . . .*" (R. 682).

In making the foregoing statement, opposing counsel not only went outside the record herein, but, in doing so, he grossly misstated the facts in regard to the most vital feature of plaintiff's case. In fact, the boldness with which opposing counsel incorrectly stated the law and testimony in the lower court was only exceeded by the boldness with which plaintiff's witnesses misrepresented the truth. In view of the success, with which said tactics met in the lower court, we are determined that this Court shall not be misled by our failure to meet such tactics by ourselves going outside the record herein *in order to answer such misstatements regarding the Beekhuis-Dunkley record.*

In said interference proceeding, not a single witness even suggested or intimated that any part of said model machine or of any other peach peeling device, embodying the Dunkley invention, was made, or the making thereof commenced or such a part purchased

before July, 1903. The said interference record, as a whole, was not offered in evidence, although parts thereof were quoted to the two Dunkleys when on the witness stand. However, such record is in printed form and both parties have copies thereof. In view of said gross misstatement regarding said record and which, as clearly shown on the face of the lower Court's opinion, was given credence by it, we challenge opposing counsel to refer this Court to any testimony by any witness in said interference or any statement in any of the briefs filed therein by Messrs. Chappell & Earl in Dunkley's behalf, even remotely suggesting or intimating that any part of said Dunkley machine was made, commenced, bought or used, prior to July, 1903, or at any time other than during the four months period when William Bruncker was at South Haven in the employ of the Dunkley Company. In fact, Melville Dunkley testified, in said interference, that Bruncker may have actually worked on said model machine. Although his said testimony was not read into this record in the precise words used by him (R. 459), we feel justified in referring to it, in view of opposing counsel's misstatements respecting the general purport of the interference testimony. Melville Dunkley, in 1910, testified in said interference, regarding said model machine, in answer to Mr. Chappell's questions, as follows:

"Q. 15. Who constructed the machine?

"A. The machine was built in our South Haven

factory under my direction. As to who worked upon it, I do not remember.

"Q. *Who was at work for you at the time that would have been likely to work on the machine, so far as you can remember?*

"A. A man by the name of *William Brunker*, another by the name of *Stewart Campbell*, another by the name of *Fred Brown*, any or all of them might have worked upon it."

The despicable and contemptible nature of said misstatement can be fully appreciated only when we consider that the same was used to bolster up a charge of false swearing made against honest men. Think of the audacity of opposing counsel stating, for the purpose of convincing the Court, that Campbell was a perjurer, that the Dunkley-Beekhuis record showed the building, in 1902, of the *only device* involved in said interference, to wit: the *skin-removing means* which constituted the model machine and comprised the wooden frame with the brushes and spray pipes mounted thereon! Not only did said opposing counsel make such gross misstatement once, but he repeated it as the final climax of his tirade of abuse and vituperation directed at Campbell. Opposing counsel's final words were:

"There is no difference between the testimony that was given in the interference and the testimony that was given here; the testimony is exactly the same in both cases, that is to say, that this machine, Exhibit 10, together with the complete tank making it a machine that was complete in 1903;

the letter of Clark shows that; it shows that the tank was obtained there; *but the machine without the tank was in 1902*, and the machine with the tank was in 1903, and *that is what the record shows in the interference case*, and that is exactly what the record shows here in this case." (R. 692.)

The grossness of said misstatement is also shown by the following statement of Messrs. Chappell and Earl, at page 24 of their brief, filed before the Examiner of Interferences, in said Dunkley-Beekhuis interference:

"Abraham Verhage was called as a witness. He testified to having seen the machine in operation in July, 1903. The witness indicates that *the first wooden frame* was made in July, 1903. He helped set the machine up with Campbell."

The Verhage testimony, upon which said statement was based, appears in the printed record in the Dunkley-Beekhuis record as follows:

"Q. 10. Will you indicate about the time, so near as you can remember, that the *first wooden frame was made*?

"A. *July, 1903.*

"Q. 11. What did you know about the machine in July, 1903, or did you see it or have anything to do with it?

"A. I did not have anything to do with it. I saw it but did not have anything to do with it.

"Q. 12. Where did you see it?

"A. South Haven.

"Q. 13. Any particular place there, do you remember that you saw it?

"A. I do not recollect any.

"Q. 14. At what plant was it that you saw it, that you remember?

"A. At the plant of the Dunkley Company.

"Q. 15. At what place in the plant was the machine set up?

"A. *It was first set up in the basement in the north wing.*

"Q. 16. Who set it up there, if you know?

"A. *Mr. Campbell* and myself.

"Q. 17. Did you see the machine work after it was set up?

"A. Yes, sir.

"Q. 18. Did it peel peaches successfully?

"A. Yes, sir.

"Q. 19. Please state the way in which the machine did the work, indicating *the parts of the machine*, and how *they* worked, as well as you are able and as well as you remember?

"A. Well, we had a belt with brushes and two rotary brushes, which was used as a carrier to carry the peach through and keep the peach revolving. Then, there was three perforated pipes that did the peeling, after they went through the lye process."

* * *

"Q. 23. I show you a photograph, 'Dunkley's Exhibit No. 1, Photograph of Frame of First Dunkley Machine,' and ask if you are able to identify it?

"A. Yes, sir.

"Q. 24. State what it is from what you know about the subject.

"A. *It is the first frame that was built, the first machine operated.*"

It is noted that "Defendant's Exhibit R" herein, is

a reproduction of said photograph, marked in the interference as "Dunkley's Exhibit No. 1, Photograph of Frame of First Dunkley Machine."

We trust this Court will bear in mind the foregoing challenge and observe whether or not opposing counsel accept it and attempt to justify said statement, respecting the alleged similarity between the two records, by *quoting* any such testimony in the interference record or any statements in the briefs filed therein.

As before stated, the preliminary statement is a brief statement of *all* the ultimate facts relied on and the proofs must be consistent with it. Therefore, on its face, it shows, in a comprehensive manner, the *whole* case of the party filing it. For the same reason, prompting us to go outside the record to quote the testimony of Melville Dunkley and Verhage, we shall set forth a copy of Dunkley's preliminary statement in the Dunkley-Beekhuis interference, although it was not copied into the record herein. Said statement reads as follows:

“United States Patent Office,
Washington, D. C.”

In Re Interference,
HERMANUS A. BEEKHUIS

vs.

SAMUEL J. DUNKLEY,
For Machines for
Peeling Fruit.

Before the Examiner
Of Interference,
No. 30,610.

State of Michigan,
County of Kalamazoo—ss.

Samuel J. Dunkley, being first duly sworn, deposes and says that he is now a resident of the City and County of Kalamazoo, and State of Michigan; that he is a party to the Interference declared by the Commissioner of Patents on the thirteenth day of July, 1909, between claims 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 of his application for Letters Patent, filed on the 29th day of November, 1904, for Machines for Peeling Fruit, and claims 14, 15, 16, 18, 19, 20, 21, 22, 23 and 24 of patent No. 864,944, issued September 3, 1907, for Apparatus for Removing the Skin from Fruit, to Hermanus Albert Beekhuis;

Deponent further states that he conceived the invention set forth in the declaration of interference during the month of August, 1902; that the invention was *first disclosed* by him to others during during the *month of September*, 1902; that a drawing of the invention was made during the month of September, 1902; that *he made no model of the invention*; that the invention was *first embodied* in a complete working structure during

the *month of July*, 1903; that the structure made at the time was successfully operated in the City of South Haven, State of Michigan, during the month of July, 1903; that the invention was reduced to practice during the month of July, 1903, and such machine has been made use of annually during the peach canning season in the City of South Haven, since that date with changes and additions.

Further Deponent sayeth not.

SAMUEL J. DUNKLEY.

Subscribed and sworn to before me on the 4th day of September, 1909.

EVELYN ROE.

Notary Public in and for said County and State.

My commission expires July 19, 1910."

(SEAL)

In his interference proceeding testimony, previously quoted herein, Dunkley was first referred to said four counts, and then he said he conceived the invention, disclosed therein, in August, 1902; that he thereafter made drawings thereof and that in July, 1903, he made the model machine, "a regular working machine" (R. 485). In other words, he claimed a reduction to practice in July, 1903, by reason of making the model, "Exhibit 10," and, *in that month, using the same*.

The Court has knowledge of the ability of Mr. Chappell as a patent attorney. Is it conceivable that Mr. Chappell, before preparing Mr. Dunkley's pre-

liminary statement under Rule 110, did not question Mr. Dunkley regarding the history of his invention and learn everything that Mr. Dunkley did in respect thereto? Is it conceivable that Mr. Chappell, before preparing said statement, did not discuss with Dunkley just what device was involved in the interference counts, pointing out to him that only the "*skin-removing means*," without any lye-tank, was covered thereby? Is it conceivable that Mr. Chappell, before taking the testimony of the Dunkleys and of any other witnesses called to corroborate them, did *not* learn from the Dunkleys, or either of them, or from any of said witnesses, that in 1902, the model "Exhibit No. 10," exclusive of any tank therefor, was built, *if in fact it was so built, in 1902?* If Mr. Chappell did learn of any such alleged fact, is it conceivable he would *not* elicit from the Dunkleys, when they were on the stand, said fact, the most vital and controlling fact in Dunkley's whole case? Having learned of said alleged fact, is it conceivable Mr. Chappell would have ignored it, and yet ask the Dunkleys about mere drawings, which had been lost? In every interference proceeding, the inventor makes an effort to establish the earliest possible date in respect to every fact pertaining to the history of his invention. The decision in an interference proceeding depends upon the respective dates established by the parties thereto.

In the Beekhuis-Dunkley interference proceeding, the only thing involved, so far as Dunkley was con-

cerned, was his brush-spray-pipe mechanism. The making thereof and the use thereof, exclusive of any lye-tank, was the material thing to be proved. If the use thereof, in July, 1903, with a lye-tank, was a reduction to practice of the invention involved in the interference, then the use thereof at any previous time, *without a lye-tank*, was *equally* a reduction to practice of said invention, *because the only invention involved in said interference did not include, as a part thereof, any lye-tank or other means for disintegrating the skin*, which, so far as said invention was concerned, could be disintegrated by placing the peaches in a pan of caustic soda solution heated over a coal oil stove located thirty-five feet or any other distance from said brush-spray-pipe mechanism and then carried thereto by hand. The foregoing being true, is it conceivable that, *if the model Exhibit 10, exclusive of any lye-tank*, was made and so used in 1902, Mr. Chappell would not have brought out such fact in said interference and relied on same as *a reduction to practice?*

In view of the foregoing situation, it is apparent that one, in order to believe the present testimony of the Dunkleys to the effect that the model Exhibit No. 10 was built in 1902, must also believe the following:

1st. That S. J. Dunkley is not to be believed when he says that no lye-tank was ever built for the model "Exhibit 10."

2nd. That Mr. Chappell, prior to preparing

Dunkley's preliminary statement, did not learn from him that model "Exhibit No. 10" was built in 1902, and

3rd. That Mr. Chappell, in preparing to take the interference testimony, did not learn from the Dunkleys that model "Exhibit 10" was built in 1902, or

4th. That having learned said fact, Mr. Chappell did not know that said model, *exclusive of any lye-tank*, embodied all the elements of every count in the interference, or

5th. That Mr. Chappell, having learned of said fact and knowing said model did include all the elements of every count, was not sufficiently versed in the patent law to know that the making and use of said model in 1902, *without a lye-tank*, was a reduction to practice if the use thereof, in July, 1903, with a lye-tank, could be considered a reduction to practice, and therefore, did not take the trouble to bring out the fact of such making and use in 1902, or

6th. That Mr. Chappell, having learned of the building of the model "Exhibit 10" in 1902, did not believe said fact to be of sufficient importance to bring out in the interference, although he did believe it to be of sufficient importance to bring out the alleged fact that, in 1902, Dunkley made some sketches of the machine, but which sketches were lost! and,

7th. That it was possible for all the witnesses in the interference to give their testimony without *voluntarily* suggesting or intimating that said model was made in 1902, if in fact it was so made, and

8th. That Brunner, who admittedly *never was at the South Haven cannery until after June 12, 1903*, committed deliberate perjury when he testified herein on defendant's behalf, that the ex-

perimental model *one-line* machine was made by Campbell while Brunker was at said cannery. *There is no possible chance of Brunker being mistaken as to dates, and, therefore, his testimony on this point, must be either true or deliberate perjury.*

In view of the foregoing, we respectfully submit that plaintiff's contention, that said model machine, Exhibit No. 10, was made in 1902, is an affront to one's intelligence.

Plaintiff's entire proofs, in reference to the history of the Dunkley invention, comprise the testimony of Samuel J. Dunkley, the alleged inventor, his son, Melville Dunkley, and H. C. Schau; the model Exhibit No. 10; Brunker's letter of June 12, 1903, to the Dunkley Co. (R. 612), which serves only to absolutely fix the period of his employment at South Haven as commencing subsequent to such date; and Exhibit No. 8, a letter to the Dunkley Co. from the Clark Engine & Boiler Co. (R. 741).

It is *most significant* that the *only documentary evidence* offered to corroborate the Dunkley testimony is said Clark Engine Co.'s letter and that was offered solely for the purpose of attempting to bolster up the preposterous excuse given by the Dunkleys for changing their testimony in reference to the year in which the model machine, Exhibit No. 10, was built. However, said letter signally fails to accomplish the

purpose for which it was offered. Said letter reads as follows:

(Letter head of Clark Engine & Boiler Company.)

"April 21, 1903.

"Dunkley Co.,
City.

"Gentlemen:

"In reply to your favor of the 21st, we regret that there should be any disappointment in the cost of *the tank*, but we find there is no mistake; you can weigh the tank, and you will find that it would be impossible to furnish it for \$25.00. We just charged up the actual time as reported by the foreman of our boiler shop. It would have pleased us, if it had cost even less than \$10.00; but we could not furnish it at a closer figure than the invoice calls for.

"Very truly yours,

"CLARK ENGINE & BOILER Co.,

"By G. C." (R. 741).

The use of said letter as a means of enabling him to change his testimony, regarding the date of building the model machine, is thus explained by Melville Dunkley:

"A. The machine was not completed until the season of 1903, and until my memory was refreshed with the letter from the Clark Engine & Boiler Company, I was not sure in my mind whether the machine was finished in 1902 or 1903. However, after reading the letter, I remembered the incident, and knew the machine was finished, the machine of which that is the frame was finished before the tank, the scalding tank, was made" (R. 465).

It will be noted that said letter refers to no particular kind of tank and tanks of all kinds are the most common things in use about a cannery. Melville Dunkley admits that tanks, other than any tank used with a peach peeler, were used in the Dunkley Company's business (R. 467). Therefore, the reference, in said letter to "*a tank*," proves nothing and said letter, on its face, does not corroborate the Dunkley testimony. Undoubtedly, plaintiff could have produced numerous bills for tanks bought at different times. The selection of any particular bill for "*a tank*" or of any particular letter, referring to "*a tank*" in order to meet the exigencies of plaintiff's case is of no corroborative significance.

However, why should such a letter remind Melville Dunkley that the model Exhibit No. 10 was made in 1902? If he knew the "alleged tank" was made after the brush-spray-device, why, in the interference proceeding, did he say the *whole* model machine was made in July, 1903? If, when testifying in 1910, he thought the alleged tank was not made until July, 1903, why did he not mention the fact that the brush-spray-device was made before? In other words, the most he could claim for said letter would be that it reminded him that the lye-tank was made before July, 1903; but that has nothing to do with the *relative* date of the building of the *brush-spray device*. If that was built *before* the alleged "*tank*," and Dunkley mistakenly thought the tank was not built until July,

1903, why did he not say the *brush-spray device*, the *only device* involved in the interference, was made before July, 1903?

Furthermore, how strange it is that all the witnesses in the interference proceeding should make the same mistake and say the model machine was made in July, 1903. Did they all take Melville Dunkley's word for it, when they so testified? Of course, the fact is that no lye-tank was ever bought or made for or used with such model machine. *Furthermore, how strange it is that the only documentary evidence produced by plaintiff is such a letter offered solely to bolster up the excuse for a change in testimony.*

As said letter, on its face proves nothing, it is apparent that plaintiff's whole rebuttal case, as to Dunkley's date of invention, rests solely and alone on the oral testimony of three witnesses, uncorroborated by any documentary evidence. Said testimony relates to events occurring over thirteen years ago. At that time, to wit, in 1902, Melville Dunkley was only twenty-one years old and Harry Schau only nineteen years old. Both of the Dunkleys are highly interested witnesses. *We feel quite safe in saying that no prior use defense was ever sustained by any court on any such showing as that made by the plaintiff herein, yet the burden on plaintiff, in proving its said rebuttal case, is precisely that on any defendant in attempting to prove a prior use defense.* As said in *Eck v. Kutz*, 132 Fed., 763:

"But the complainant is a highly interested witness, and his son is not much better; nor does the cam cylinder prove anything by itself, however primitive, being adaptable to whatever date may be assigned to it. The earlier date contended for rests, therefore, upon the mere say so of the father and son, without any corroboration or convincing circumstance, which hardly fulfills the high degree of proof required when the date of an invention is material in order to escape anticipation. *Clark Thread Co. v. Williamantic Linen Co.*, 140 U. S., 481; *Westinghouse Electric & Mfg. Co. v. Saranac Lake Erie Light Co.*, 108 Fed. 231."

Of course, the opposing parties appreciated the value and necessity of offering documentary evidence to corroborate the oral testimony of plaintiff's three witnesses, but no such evidence is or ever was in existence. The testimony of plaintiff's witnesses is not true and said fact not only explains the absence of documentary evidence, but it also explains the admitted failure to seriously attempt to obtain such evidence. On this point, the patentee Dunkley said:

"MR. WHITE—Q. Have you made any effort to secure any records proving any of the dates regarding the making or using of any of these peach-peeling machines, and if so, what efforts have you made? A. *I do not remember making any particular inquiries. I think my son did*" (R. 503-505).

The Court must appreciate the immense amount at stake in this and contemplated litigation. Hundreds of thousands of dollars, according to plaintiff's con-

tentions, are certainly involved. Plaintiff's officers obviously knew that the burden of proof would be shifted to plaintiff and for that very reason had Schau out here to testify in rebuttal. A mere tyro in the patent law fully appreciates the heavy burden of proof on a plaintiff in attempting to carry the date of the patentee's invention back of an anticipation. A mere tyro in the patent law fully appreciates the almost absolute necessity of corroborating oral testimony with documentary evidence when such an issue is to be proved. However, the Dunkleys knew there was no use to attempt to secure genuine documentary evidence to corroborate false testimony. Such testimony can be corroborated only by manufactured evidence. We shall later show that there is, in existence, plenty of documentary evidence which will corroborate the testimony of any witness telling the truth regarding the making of model "Exhibit No. 10" and Dunkley's first commercial machine.

"As counsel says, there are occasions in the world when the paucity of proof in the affirmative is positive proof in the negative."

American Bell Tel. Co. v. National Tel. Mfg. Co., 109 Fed., 1018.

In view of the total lack of any documentary evidence corroborating the oral testimony of the Dunkleys, we shall now consider the extent to which, in our opinion, the Court should or can rely on the

memory of said witnesses. Certainly one must admit that, when property rights of a value of hundreds of thousands of dollars are at stake *and dependent upon the mere memories of three witnesses as to events occurring thirteen and more years ago*, said memories should be able to survive a real acid test. Furthermore, no reliance can be placed on the memory of a witness who remembers nothing but the few facts essential to the establishment of the case of the party calling him. *Likewise, no reliance can be placed on the memory of a witness who declines to remember any fact that possibly can be disproved by documentary evidence.* Some witnesses are willing to remember anything, if they only feel quite sure that what they remember cannot be disproved by documentary evidence.

We shall quote the patentee Dunkley's answers to numerous questions regarding important facts to show the unreliability of his memory. The quoted questions do not, in the record, follow each other, in most instances.

"Q. Where did you buy the caustic soda in the year 1903?

"A. *I really cannot tell you.*

"Q. Do you know what amount of it you bought in 1903?

"A. *No*" (R. 490).

* * *

"Q. In 1902, did you have peach pitting machines operating in that cannery or were the peaches pitted by hand?

"A. *I am not exactly clear on that; we pitted lots of them by hand*" (R. 491).

* * *

"Q. Where was the model constructed, in that cannery?

"A. I could not say; *it might have been constructed in Kalamazoo.*

"Q. *What kind of gears were used in that model?*

"A. *I could not say that.*

"Q. Where were these gears procured?

"A. *I could not say that.*

"Q. Where were the brushes, which were used in the model procured?

"A. *I could not say that; I think they made them in Kalamazoo*" (R. 493).

* * *

"Q. Did Stewart Campbell build the model machine, 'Plaintiff's Exhibit 10'?

"A. *Not that I know of*" (R. 493).

* * *

"MR. WHITE—I direct your attention to this 'Plaintiff's Exhibit No. 10' and ask you what function, in the operation of the machine, did these gears perform which are on the shaft on which the pulley, at the other end of the machine, is mounted?

"A. I presume, *if there is gears there*, to help turn the brushes.

"Q. Do you know?

"A. *No, I do not know.* It is simple enough machine; anybody could judge by looking at it" (R. 496).

* * *

"Q. Who made the drawing for the commercial machine?

"A. *I could not say about that*" (R. 497).

* * *

"Q. Now, who made the drawing for that lye-tank which was used in that commercial machine?

"A. *I could not say to that.*

"Q. Where was that lye-tank procured which was used in that commercial machine?

"A. *I could not say to that; we had a great many places to procure tanks from*" (R. 498).

* * *

"Q. Where did you get the brushes for that first commercial machine?

"A. *I could not say as to that.*

"Q. Where did you get the chains which were used in the lye tank for that commercial machine?

"A. *I could not say as to that*" (R. 499).

* * *

"Q. Who operated the first commercial machine during the first year it was operated?

"A. *I don't know that*" (R. 500).

* * *

"Q. When was the third peach peeling machine made by the Dunkley Company?

"A. The third?

"Q. Yes, counting the experimental model machine as the first?

"A. *I could not say as to that*" (R. 500).

* * *

"Q. Was there one of these machines (cast-iron frame machines) built prior to November 1, 1904?

"A. *I could not say as to that*" (R. 501).

* * *

"Q. Where did you get the castings for those cast-iron frame machines?

"A. *I could not say about that*" (R. 501).

* * *

"Q. How many peach peeling machines of this type has the Dunkley Company built?

"A. Which type, the iron?

"THE COURT—No, the type of the patent, commencing with the experimental model machine.

"A. *I could not tell you without looking over our books*" (R. 501).

* * *

"Q. Has the Dunkley Company at any time up to the present time made more than ten peach-peeling machines of the type disclosed in the patent?

"A. *I could not say*" (R. 502).

* * *

"Q. You mean that you think you started using these seamers, shown in the photograph, in 1902?

"A. I think we did, *but I am not clear; it was along about that time; we made so many changes and put on so many things, it is hard to say*" (R. 508).

The memory of the patentee's son is no better than that of his father. We now quote a number of the son's answers to various questions:

"MR. WHITE—Q. Now, in what part of the cannery was this first machine for peeling peaches constructed, and by whom?

"A. This first machine, *I do not know just where it was constructed nor by whom it was constructed*; it was constructed under the orders of myself and my father, and I saw it at different

places in the factory during the process of construction, which took some time" (R. 434).

* * *

"Q. You don't know to whom you gave instructions to make that first machine?

"A. *No*; there were so many of the boys around there that were capable of putting that together, I could not say who I gave the instructions to; any one of these I have named was capable of building it.

"Q. You don't know who built that first machine?

"A. *No*" (R. 435).

* * *

"Q. Where did you get the brushes which were used on this first machine?

"A. I think they came from the Indianapolis Brush & Broom Factory; however, *I am not sure*.

"Q. Will you state positively that they did not come from Riddeford & Company, Chicago?

"A. *They may have*; we have bought brushes from them" (R. 436).

* * *

"Q. *Are you willing to state that that first machine was not driven by use of friction gears?*

"A. *No, I would not say.*

"Q. As a matter of fact, it was driven by a friction gear, isn't that correct?

"A. *I don't know; I could not say; I have an idea it was driven by gears, but as to the manufacture, I could not remember*" (R. 436).

* * *

"Q. Who made the drawing for this second machine?

"A. *That I am unable to say.*

"Q. Who worked on the second machine?

"A. *That I would be unable to say.*

"Q. Who operated that second machine during the peach season of 1903?

"A. *That I could not say.*

"Q. Where did the gears come from which were used on the second commercial machine?

"A. *I am unable to state*" (R. 446).

* * *

"Q. Where was the tank purchased for this second commercial machine?

"A. *I am unable to state.*

"Q. Where were the chains bought for this second commercial machine which were used in the tank?

"A. *I am unable to state*" (R. 447).

* * *

"Q. Where were the brushes bought for that second commercial machine?

"A. *I am unable to state*" (R. 448).

* * *

"Q. Where was the caustic soda bought which was used in the year 1903, in connection with the peeling of peaches that year?

"A. *I am unable to state*" (R. 448).

* * *

"Q. On or about November 1, 1904, had you yet, at that time, built a cast-iron frame machine, an improvement on the first commercial machine?

"A. *I could not tell you just when those were built*" (R. 449).

* * *

"Q. When this experimental model machine was first tested was it connected up with that shaft in that room?

"A. *That I could not tell*" (R. 451).

* * *

"Q. Where were the castings made for the first iron frame for the peach peeling machine?

"A. *I do not remember*" (R. 460).

* * *

"Q. Did the Clark Engine & Boiler Company deliver to your factory in Kalamazoo about January 30, 1904, a tank, a lye-tank?

"A. *That I could not remember*" (R. 461).

The following answers of this witness, regarding an occurrence as late as February, 1916, indicates about what weight can be accorded to his testimony:

"Q. Did you or did you not buy any other tanks?

"A. In 1904 we bought other tanks; I could not say from whom; then we bought a number of them later. The letter which I found regarding the Clark first tank was the only record that I was able to find which refreshed my memory at all on that matter, *and we afterwards went and looked at the invoice and at the same time found that you had been inquiring at the same place.*

"Q. *Did you go to the Clark Engine & Boiler Company and look at their records?*

"A. *Yes.*

"Q. Did you find there that the order number for that tank was 9463?

"A. I could not say as to the order number.

"Q. What man of the Clark Engine & Boiler Company did you see in regard to that order for that tank?

"A. *I did not see anyone; I sent someone.*

"Q. Who did you send?

"A. From my office.

"Q. *Who did you send from your office?*

"A. *I don't know just who I sent, Mr. White*" (R. 440).

It will be noted the witness first said *he went to the Clark Company's office*. When he perceived the possibility of being checked up on said statement, he immediately changed his testimony and said *he sent someone*. He finally appreciated the dilemma he was in, so sought the usual refuge of lapse of memory regarding an incident that occurred only a month before. The reason for this witness pretending to have made said investigation at the time mentioned, was undoubtedly to enable him to pretend that, before the trial of these cases began, he knew of the investigations made by White, one of the defendant's attorneys, whereas, in fact, he was taken by surprise at the knowledge of defendant's attorneys.

Certainly, if a witness cannot remember the details of such an occurrence in February, 1916, his memory is not to be relied on to prove, *beyond a reasonable doubt*, what occurred fourteen years ago.

Harry Schau was the only witness called to corroborate the Dunkleys' testimony. He was only nineteen years old in 1902. He states that, in November, 1902, he saw the model machine "Exhibit No. 10" in the basement of the north wing of the cannery at South Haven. Said model was made in said basement room in September and October, 1903, and was tested there, for the first time, in October, 1903. No doubt it was still in said basement room in November, 1903. Being one year out in regards to the time when he first saw the model machine, throws all of his tes-

timony one year out. In other words, he fixes his dates one year too early, and, therefore, there is no occasion for analyzing his testimony in detail.

Plaintiff's whole rebuttal case necessarily depends on establishing the building of such model "Exhibit 10" in 1902, as the building of same starts the history of Dunkley's alleged invention according to his own testimony to the effect that he conceived the invention in August, 1902, and built and completed said model "Exhibit 10" in that same month. Regarding said "Exhibit 10," he said: "That machine was completed sometime in August, 1902" (R. 510). We wish to particularly emphasize the foregoing fact that the inventor, Samuel J. Dunkley, testifies herein that he both conceived the invention in August, 1902, and, in that same month, completed the model machine, "Exhibit No. 10." Therefore, the building of such Exhibit No. 10 and the date of conception of the invention by him, are represented by Dunkley to have been practically contemporaneous. Therefore, the date of the building of the model, for all practical purposes, fixes the date of the conception. Defendant's proofs, conclusively showing said model was built after Bruncker's arrival at the South Haven cannery in 1903, destroy the whole Dunkley story. Of course, said proofs are consistent with and corroborated by the Dunkley testimony, in the interference proceeding, to the effect that said model was,

in fact, built in 1903, at a time when Brunker was at South Haven.

The exigencies of the interference proceeding did not prompt the Dunkleys to carry the date of completion of said model back more than three months prior to the actual date of completion. In said proceeding, they stated it was built and completed in July, 1903. Defendant's proofs, herein, show it was built during September and October, 1903, and completed and tested in the latter month. The account book of defendant's witness, E. B. Mapes, conclusively shows it was not completed until after October 6, 1903, because, on that day, he completed the *friction gears* which were used in the model to drive the rotary brushes therein (R. 638).

Defendant's witness, William Brunker, at present the proprietor of a restaurant in Sacramento, was employed by the Dunkley Company in 1903 at its South Haven cannery. His employment commenced the latter part of June and ended the latter part of October, 1903. Regarding Brunker, S. J. Dunkley says:

"Q. When did William Brunker enter the employ of the Dunkley Company and when did he leave it?

"A. I don't think he stayed over three or four months; he entered the employ *some time in June, 1903*; that is my recollection" (R. 506).

In connection with Brunker's cross-examination,

plaintiff's counsel read into the record Brunker's letter of June 12, 1903, written by him in New York, to the Dunkley Company concerning his proposed employment by that company (R. 610). This fixes absolutely the fact that Brunker did not enter that company's employ until after the middle of June, 1903. He remained in its employ a little over four months and left on the last boat to Chicago (R. 603). He was never in South Haven or in Kalamazoo at any other time (R. 603). *Said period of four months in 1903 covers Brunker's whole connection with the Dunkley Company and, therefore, there is no possible chance of Brunker being confused as to the year or period in which anything occurred at South Haven and concerning which he has testified.*

Brunker's letter shows he was employed to make fruit jams but it was soon found out that said product would not pay. On cross-examination he said:

"XQ. Then what did you do?

"A. Then Campbell came along after that, I could not say just how long after I went to South Haven, but probably a few days, and he said: 'I came down to put the factory in shape for the packing season and install some machinery,' and he says: *'I have a big table to make,'* so I helped him with his work, regular laboring work.

"XQ. What was the machinery that you installed?

"A. Well, it was—the seamer is one of them for seaming the covers on the cans and there was some vacuum machine there; there were some four or five of them altogether.



"XQ. Where did these machines come from?

"A. I don't know where they came from but they came from one or two cars, I don't know which, and they were there; I could not say just whether they came before I went there or after, but they came on the railroad" (R. 609).

Regarding the "*big table*" built by Campbell, with some slight assistance from Brunker, the latter says:

"Q. What kind of a table was that that you refer to?

"A. It was a table nearly the length of the room with a carrying belt down the center; the idea of it was to put their peeled goods on the belt, and it was carried along to where they were washed and packed" (R. 599).

On the opposite page appears a cut of the peach peeling table referred to by the witness. Said cut is reproduction of "Defendant's Exhibit V, photo of Dunkley Peeling-table" (R. 527). "Defendant's Exhibit X, photo of Dunkley, filling table," shows an extension of the peeling table, said extension being used as a packing or filling table (R. 527). A large number of women are clearly shown, in said photograph, peeling peaches *by hand* and by the use of the St. Clair-Scott machines. The appearance of the fruit being handled and the use of said machines conclusively prove said fruit to be peaches. *Said machines were only used to peel peaches.* The pears were always peeled by hand and "there never was much:

Michigan has never been much of a pear State" (Melville Dunkley, R. 421).

The building of said peach peeling table in July and August, 1903, is absolutely and totally inconsistent with the Dunkley testimony that, at that very time, they had a lye-peeling machine which necessarily would do away with the peeling of peaches by hand, either with the use of hand knives or the St. Clair-Scott machines. Both the Dunkleys and opposing counsel fully appreciated the significance of the proof that, in July and August, 1903, the Dunkley Company went to the large expense of changing the 1902 method of handling peeling peaches about a *number of small tables* and substituted therefor *one long table* at which the women could sit while peeling peaches *by hand* and with the St. Clair-Scott machines. Both Melville Dunkley and opposing counsel (R. 492) became very much agitated over the very idea of merely calling such table a "*peach peeling table.*" Naturally. The building of said peach-peeling table in July and August, 1903, utterly destroys the last remnant of even the remotest probability of there being any truth in the Dunkley story that, *at that very time*, they had a lye peach peeling machine *which would do away with any necessity for such a peeling table.* Furthermore, we shall hereafter show, by Campbell's testimony, that, when the Dunkleys did have such peach peeling machine in 1904, all but about twenty or twenty-five feet of said peach

peeling table was removed and what was left was used for inspecting and sorting the peaches after they came from the pitting machines, which followed the said peach peeling machine (R. 541). *Said change*, in 1904, conclusively demonstrates that said table would not have been built in 1903 prior to the 1903 peach season if, at that very time, the Dunkleys had a lye peach peeler. That such change in the table may have been made, as testified to by Campbell, is admitted by Melville Dunkley, who says:

"A. *The table might have been changed.* I don't remember of any time that it was moved to make way for a peeling machine; the proportion of the drawing here is not wide *however*; it has been grouped together to a considerable extent" (R. 453).

Brunker's testimony conclusively fixes the date when said table was built. Regarding said table, the patentee, Samuel J. Dunkley, said:

"Q. In 1903, during the months of July and August, was there constructed in your cannery at South Haven a peach peeling table about 90 feet in length having a conveyor down the center and platforms upon either side upon which were placed chairs for the women peeling peaches?

"A. I remember such a table that was there, a conveying table, but I do not remember just what time it was built.

"Q. You don't remember what year it was built?

"A. No. *I know it was built after 1902.*

"Q. And that table was built as a peach peeling table?

"A. Not particularly; as a peach pitting and *peeling* table and to inspect the fruit" (R. 491).

Of course, when the peaches were peeled *by hand* at said table, the women, at the same time, halved and pitted them *by hand*. The halving and pitting were merely incidental to and a part of the operation of peeling *by hand*. The women also naturally inspected the fruit when they peeled it; no second inspection could or would be necessary. Hence, Mr. Dunkley's more elaborate description of said table is consistent with the fact that it was, in fact, *a peach-peeling table, which was built after 1902*.

Regarding one of the row of small peach-peeling machines, located at the right edge of the peach-peeling table shown in said photograph thereof, S. J. Dunkley said:

"Q. I draw your attention to the small machine on this table in front of the operators, and ask you to state if the same is one of these St. Clair-Scott Peach Peeling Machines?

"A. It looks like it; *I might have had them there*" (R. 492).

As indicating how little reliance can be placed in the testimony of Melville Dunkley, we quote as follows from his testimony regarding such peeling table:

"Q. How long was this peeling table?

"A. It was not a peeling table, it was an inspection table.

"THE COURT—*The witness has stated that twice, that it was not a peeling table as you have described it, but it was placed there in 1904 and had an endless conveyor on it and was for inspection purposes. He said no peaches were ever peeled on it.*

"MR. WHITE—Q. Then there was never located on this table the Scott machines for peeling peaches?

"A. *Not to my knowledge.*

"Q. You used that type of machinery in your factory, did you, for peeling peaches?

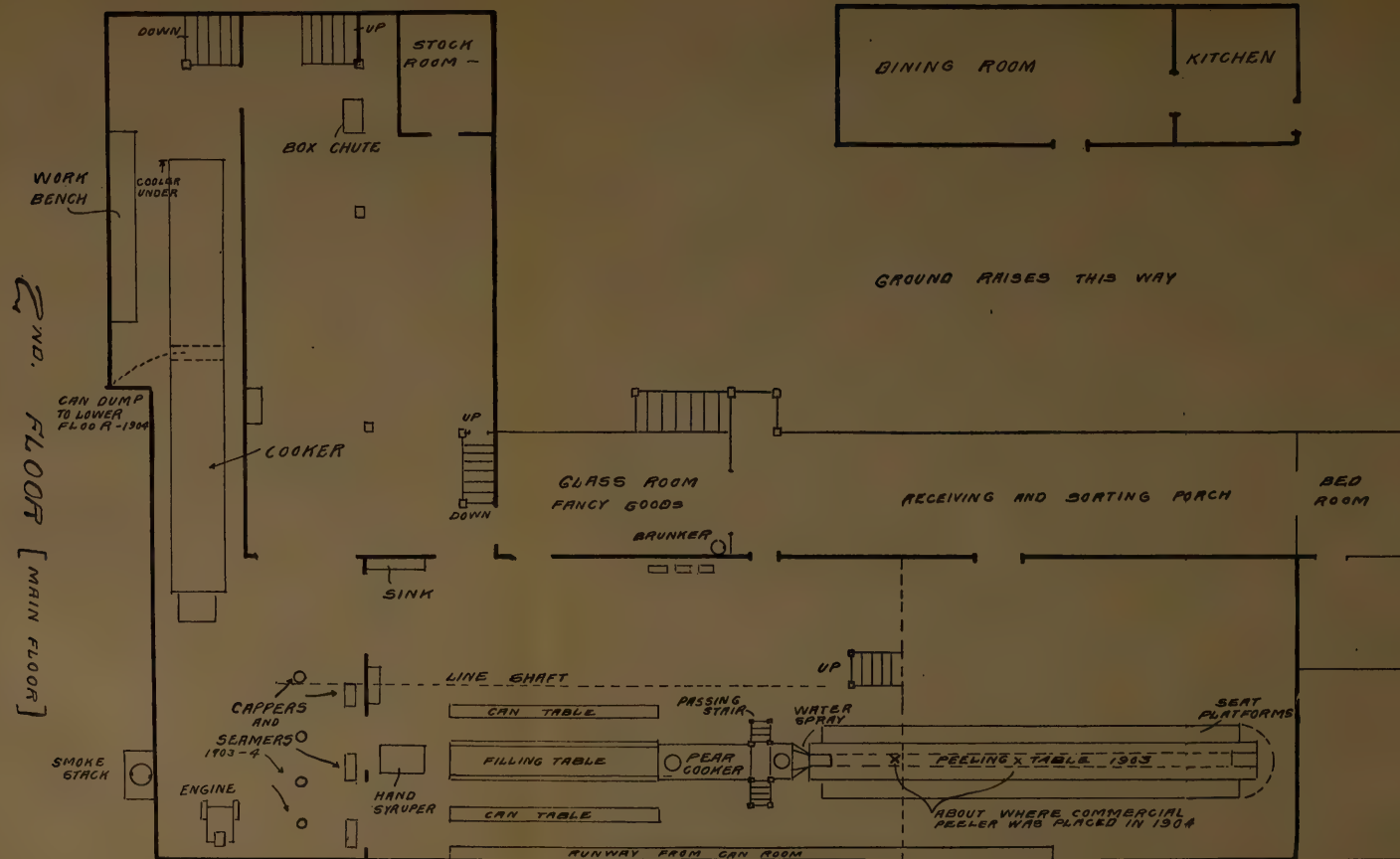
"A. In the early days, yes" (R. 453).

When Melville Dunkley was on the stand, he did not know we had a photograph of such peach-peeling table and of women actually using it as such and peeling peaches thereon, both by the use of knives and the St. Clair-Scott peach peeling machines mounted on the table. Said photograph was not produced until S. J. Dunkley took the stand (R. 492). Therefore, Melville Dunkley felt safe in falsely testifying that the table was *not* a hand-peeling table built in 1903, the significance of which fact both he and plaintiff's counsel fully appreciated.

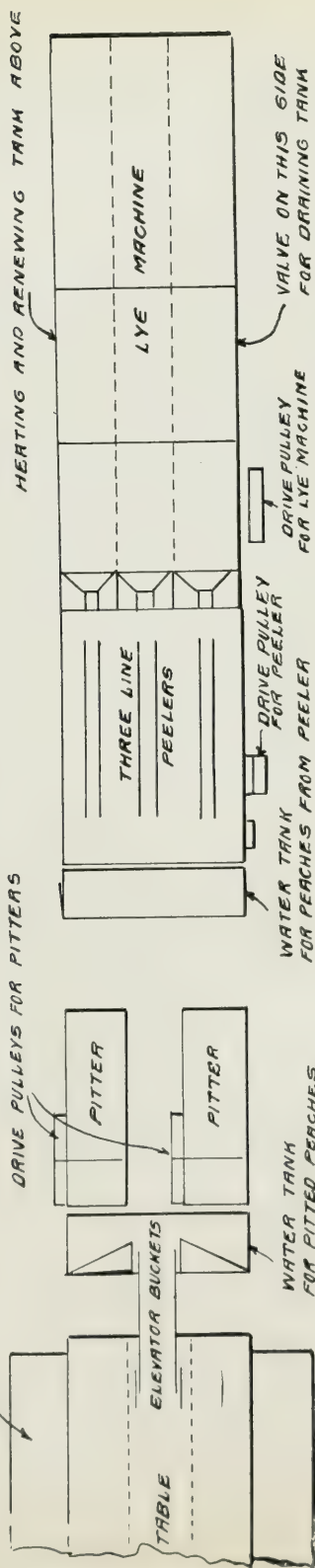
It will be noted that Melville Dunkley persisted in calling said table an "*inspection table*" and asserted it was built in 1904. Bruncker's testimony shows it was built in 1903, and the photograph and S. J. Dunkley's testimony show it was used as a peeling table. *In 1904, most of this table was removed and the part left was, in fact, actually used as an inspec-*

tion and sorting table. In the place of that part of the table removed were located *the first commercial lye peeling machine*, peach pitting machines for halving and pitting the peaches delivered from the peach peeling machine and an elevator for conveying the halved peaches from the pitters to that part of the peeling table that was left. As the peaches, up to this point, had been operated on only by machines, it was, of course, necessary to inspect them and sort out the imperfect fruit. For such inspection work, only a short table was required. *The absurdity of having a table 80 to 90 feet long for mere inspection work is apparent.* The necessary length of such a table is obviously determined by the number of inspectors required to do the work of inspection. Any such table longer than required to accommodate such inspectors, would be useless. Furthermore, there would be no economy in using the lye peach peeling machine if a great number of inspectors were required. On the other hand, the peach peeling table had to be of great length to accommodate the large number required to peel peaches by hand. The large number of women employed by the Dunkley Co. is indicated by S. J. Dunkley's statement ". . . we had built a dormitory that would take care of 150 girls . . ." (R. 479).

On the opposite page appears a reproduction of "Defendant's Exhibit T" showing diagrammatically the 1903 arrangement of the various machines and devices on the main floor of the Dunkley South Haven



PART OF
PEELING TABLE - 1903



cannery, with the exception of the "Can Dump to lower floor" which was not put in till 1904, as indicated in the cut. It will be noted that the location of the machines, which *Brunker* assisted Campbell in installing, are shown on the cut as well as the location of the peach peeling table and the extension thereof used as a filling or packing table. In 1904, most of the peach peeling table was removed to make way for the *first* commercial lye peach peeling machine, the peach pitters and the elevator. On "Exhibit T" is indicated about where these devices were located after that part of the table had been removed. On the opposite page appears a reproduction of "Defendant's Exhibit U," showing the 1904 arrangement of the commercial lye peach peeling machine, the pitters, elevator and *the part of the peeling table that was left and used as an inspection table* where the pitted peaches could be inspected and the imperfect fruit sorted out.

Opposite page ~~27~~ appears a reproduction of "Defendant's Exhibit X," a photograph of the extension of the peeling table, used as a filling or packing table. Regarding such table S. J. Dunkley said:

"Q. In the year 1903, was there, as a continuation of that long table, which I have designated a peeling table, a table of this type which was used as a filling table?

"A. *I don't know; there might have been*" (R. 508).

It will be noted that Brunker says the seaming machines arrived on railway cars at the South Haven cannery just before or just after he got there in 1903; he does not know which, but they came on the railroad and he helped Campbell install them. As indicating the unreliability of S. J. Dunkley's memory, we quote as follows from his testimony regarding said seamers:

"Q. I show you another photograph and ask you to state what the same is?

"A. This looks like one of our first open top double seamers; we were about two years ahead of the other canneries in that respect.

"Q. In 1902, you seamed by hand; is that correct?

"A. I think we started on the open top in 1902, as near as I can remember.

"Q. You mean you think you started using these seamers, shown in the photograph, in 1902?

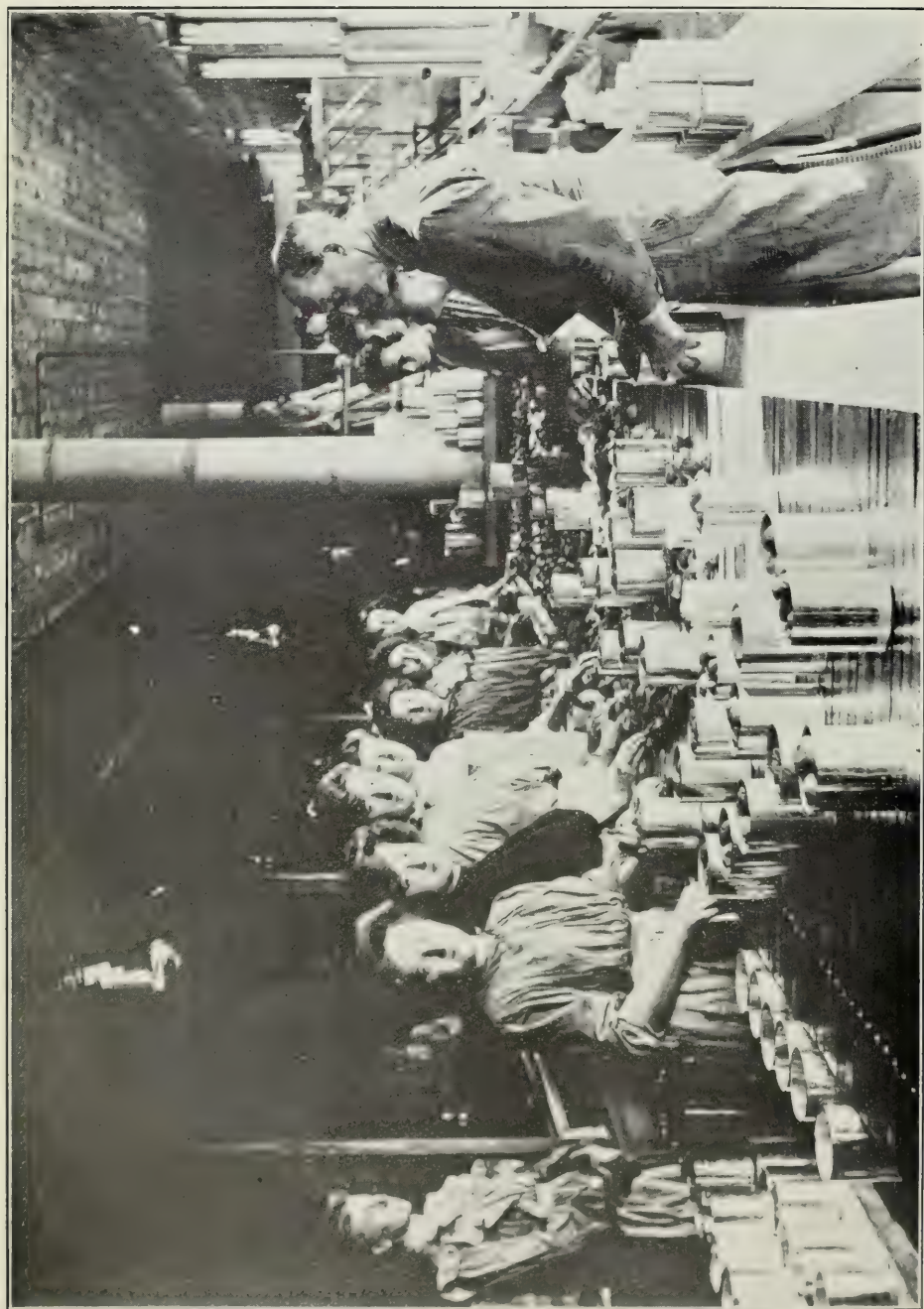
"A. *I think we did, but I am not clear; it was along about that time; we made so many things that it is hard to say*" (R. 508).

On the opposite page is a reproduction of the photograph shown to the witness and disclosing the seamers referred to.

Before referring to the testimony of Stewart Campbell, we desire to quote from the lower Court's opinion regarding the proofs relative to the history of the Dunkley invention:

"The main reliance by defendant in the evidence, is upon the testimony of the witness Camp-





bell and that of the witness Bruner. I indicated at the trial, and my mind has only been confirmed in that view by my review of the evidence, that I could not extend the limits of my credulity sufficiently to put credence in the testimony of Campbell. That he worked for the plaintiff at or about the time that he claims, there is no question, but the claim that he puts forth as to what he did in the premises and the time it was done, is entirely beyond my ability to believe. Bruner *tends to corroborate him in certain respects*, but it is not sufficient to change my conclusion on the facts.

"In its essential substance, I regard the evidence on behalf of the plaintiff as making a case *substantially free from doubt*, that the plaintiff's assignor conceived this device and put it into use at a time *at least a year prior to the time claimed by Campbell*, and as this is a question on which the case turns the result is that the decree must go for the plaintiff" (R. 699).

With all due respect to the lower Court, we cannot refrain from saying that, in view of the record herein, the foregoing conclusions are most remarkable and the unexplained process of reasoning, by which the same were arrived at, is entirely incomprehensible to us. In fact, the lower Court's attitude toward defendant's case and defendant's witnesses is incomprehensible to us. *In 1910*, six years prior to the trial of this case, the Dunkleys testified that the model machine was made in 1903, and that Campbell and Bruner may have made it, as they were in the Dunkley Co.'s employ at the time. Campbell and Bruner both take the stand herein and testify that

said former testimony of the Dunkleys is true in respect to the making of said model in the year 1903, and that Campbell made it with some slight assistance from Brunker. The Dunkleys take the stand, change their former story in respect to its most vital feature, and say the model was made in 1902, almost a year before Brunker ever entered the Dunkley Company's employ; and the lower Court, *on such changed testimony*, in effect condemns Campbell and Brunker as perjurers, for so corroborating the 1910 testimony of the Dunkleys! We are absolutely certain that Campbell and Brunker are not the witnesses who committed perjury in this case. We are absolutely certain that the two Dunkleys deliberately committed perjury herein and if this Court can, within the proprieties, recommend that the United States Department of Justice, with all its resources, investigate the facts of this case and bring to justice the guilty parties, we ask that such a recommendation be made. Such a request is made because of the difficulty of getting such Department of the Government to take action in respect to perjury committed in a civil action. In respect to such an investigation, we can safely predict that it will prove most successful, as there are certainly dozens of witnesses, scattered throughout the United States, who have knowledge of the facts and many of whom appear in the photographs included in this brief. We appreciate the foregoing request may be an unusual one, but in this

enlightened age, we can see no impropriety in suggesting, in a Court of Justice, any course which may tend to promote justice.

It will be noted that the lower Court states that "Brunker *tends* to corroborate him (Campbell) in *certain respects* . . ." As a matter of fact, Brunker corroborates Campbell in *all* respects, so far as the vital facts of the case are concerned. Brunker states the model machine was made when he was in South Haven in 1903; that it embraced *no lye-tank*; that it was the *only* brush-spray peach peeling machine there while he was there; and that, during the 1903 peach season, *no* peaches were peeled *commercially* on such machine. His testimony, therefore, fully corroborates Campbell's testimony in respect to all the controlling facts. Furthermore, the testimony of both Campbell and Brunker is corroborated in part by the testimony of Mapes and by Mapes' account book.

In view of the foregoing, we respectfully ask the Court to consider the testimony of the various witnesses, on this phase of the case, from the viewpoint that it is either true or deliberate perjury. It is only by taking such a view of the testimony that one can appreciate the full significance of every answer; of every evasion; of every lapse of memory. We also ask the Court to consider the uncontradicted circumstantial evidence in the case, in respect to the ordinary rules governing human conduct; the possibility of any such testimony, as that given by Campbell

and Brunker, being fabricated and Brunker being coached to give the full history of a device now contended by plaintiff to have been built almost a year before Brunker was ever in South Haven or knew anything about it; the possibility of the innumerable facts of said testimony, if fabricated, being made to dove-tail so nicely with the innumerable facts admitted by the Dunkleys; and finally, the probability of any one, connected with the defendant, daring to persuade Campbell, Brunker and Mapes to commit perjury in respect to facts of which scores of persons, now scattered throughout the country, have knowledge.

The change in the Dunkley story to meet the exigencies of this case, makes the following remarks most pertinent:

“A plaintiff, we think, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than a mere witness. He is an actor seeking the intervention of the judicial power in his behalf, and thus subject to the rule ‘*allegans contraria non est audiendus*,’ which, as stated in Brown’s Legal Maxims, p. 130, ‘expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to “blow hot and cold” with reference to the same transaction, or insist at different times, on the truth of each

of two conflicting allegations according to the promptings of his private interest'."

Smith v. Boston Elevated Ry. Co., 184 Fed., 389.

Stewart Campbell, who has been employed in the Signal Service of the Southern Pacific Company since August, 1905, and now resides in Berkeley, California, entered the employ of the Dunkley Company early in 1902, and left its employ on September 3, 1904. Regarding Campbell and the reason for and the nature of his employment by the Dunkley Company, Melville Dunkley said:

"Q. What were Campbell's duties during the time he was in your company's employ?

"A. *He was employed primarily to develop the syruping machine and the peach pitter*, of which he had given some idea that he could build a machine capable of pitting peaches; *he was known as more or less of a genius* and was a brother of a family friend.

"Q. He was really employed during those years to *originate and invent* new devices of (or) machines in your cannery; is that correct?

"A. Just the special two; he had the idea before he came with us, we understood from him, from others" (R. 456).

It will be noted that even Melville Dunkley did not hesitate to say that *Campbell was known as a genius and was actually employed to invent machines*. Such a statement, coming from him, is certainly most significant, in view of Campbell's testimony.

Regarding the syruper, referred to by Melville Dunkley as Campbell's invention, S. J. Dunkley said:

"Q. In the month of December, 1903, did you buy any gears from the Boston Gear Works at Boston?

"A. I shouldn't wonder but what we did, for we were building *some machines, I think Campbell was at that time, I think he was building a complicated syruper machine*" (R. 500).

It will be noted that, in the opinion of S. J. Dunkley, one of the inventions, *admittedly made by Campbell*, was a "*complicated*" machine. *It will also be noted that it was Campbell who was also building the other machines referred to by Dunkley.* The other invention, admittedly made by Campbell, was the peach pitting machine. On page 583 of the record, there is a description of such pitting machine. It is apparent, from such description thereof, that said machine was the most complicated of any machine that Campbell said he built and *it is admitted he invented the same.* On three other inventions, made by Campbell, plaintiff's attorney herein, Mr. Campbell, as his attorney, secured patents. One of these patents, "Defendant's Exhibit Z" (R. 544), covers what Campbell terms an "orchard pitter" and contains twenty-five claims. The said number of claims indicates the radically novel nature and also the complexity of said invention. On the opposite page is reproduced Fig. 1 of said patent for the purpose of showing the com-

No. 807,416.

PATENTED DEC. 12, 1905.

S. L. CAMPBELL.
PITTING MACHINE.

APPLICATION FILED DEC. 5, 1904.

3 SHEETS—SHEET 1.

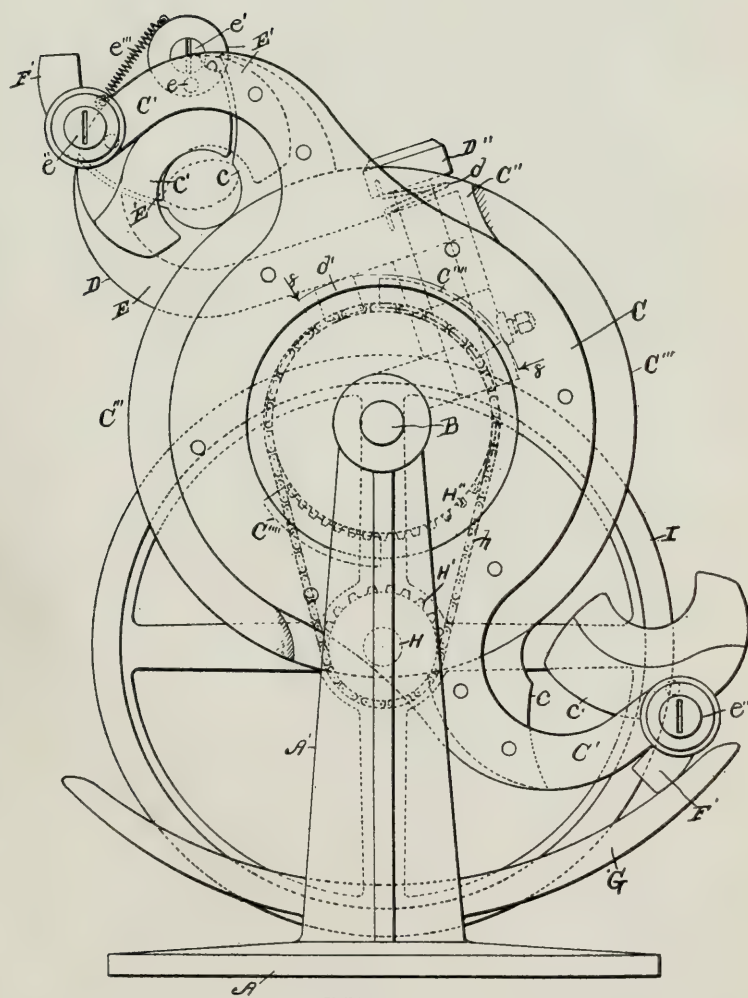


Fig. 1

Witnesses

Bessie K. Ooms
Ethel Siller

Inventor,

Stewart L. Campbell

By Chappell & Earl
Att'ys

plicated mechanical movements embodied in such machine so invented by Campbell. The foregoing shows that the Dunkley Company employed Campbell *as an inventor to invent and develop machines and that his duties embraced the actual designing and building of machines.*

For about the first two months of his employment by the Dunkley Company, Campbell, however, did only odd jobs about the factory in Kalamazoo and received only a salary of \$60.00 per month, it being understood that he was to receive a raise when he began to do regular work at South Haven, to which place he went about April, 1902 (R. 552-556). In 1902, a salary of \$60.00 was equal, in purchasing power, to a salary, at the present time, of nearly one hundred dollars anywhere in the country. Furthermore, in a small place, salaries naturally would not be as high as in large cities and the high salaries paid in California to machinists are no criterion by which to judge the value of a man's services performed fifteen years ago in the East for any particular salary. When Campbell began his regular work, he was raised to about \$75.00 (R. 556). Thereafter, he was raised to \$100.00 per month and expenses, while at South Haven (R. 564). Such a salary, in 1903, would equal in purchasing power anywhere in the country, at the present time, not less than \$175.00 and probably more than \$200.00 in large cities. A salary, having a present-day purchasing value of \$175.00 in

a small place like South Haven, undoubtedly was there considered a large income. It is quite certain that Campbell was the highest salaried man in the Dunkley Company's employ.

After the first month or so of his employment during the early part of 1902, there is no question but that *Campbell was almost continuously engaged in designing, building, remodeling or repairing machines and apparatus* used in and about the Dunkley Company establishments at Kalamazoo and South Haven. There is no suggestion by the Dunkleys that, after said early period of his employment, he did any other kind of work. It will also be noted that, nowhere in their testimony, do the Dunkleys name any other man as one who was regularly engaged in said kind of work for the company, although they were most reluctant to admit that Campbell made the model Exhibit 10 and the first commercial peach peeling machine. *However, they did not dare assert that any other employee did build said machines and name him because they feared we would be able to locate such employee.* It must be apparent to anyone, familiar with the record herein, that Campbell knows more than anyone else about the construction of the various machines made by the Dunkley Company during the years 1902, 1903 and 1904. His testimony, as compared with that of the two Dunkleys, conclusively proves that fact. Furthermore, it is incredible that the Dunkleys should not know that Campbell possessed

such knowledge of what transpired at the Dunkley Company's establishments during those years because they knew he, *the man actually employed to invent, develop, design and build new machines*, above all others, was in a better position to gain such knowledge. Therefore, if the Dunkleys had desired the truth to be brought out in this case, they knew they could get no better witness than Campbell. Did they try to get him as a witness? Did they want him as a witness? No, indeed. In that regard, S. J. Dunkley's testimony, regarding meeting Campbell in February of 1916, in Kalamazoo, is most illuminating:

"Q. When you saw him in Kalamazoo, did you speak to him, ask him where he lived?

"A. I do not remember; *I might have.*

"Q. In that conversation, did he tell you he lived in Berkeley, California?

"A. *He might have.*

"Q. At that time did you speak about this suit and the possibility of getting him as a witness for you?

"A. *No, I never mentioned it; I did not think of it*" (R. 506).

Regarding a similar meeting between Campbell and Melville Dunkley at Kalamazoo, in February, 1916, only a few weeks before the commencement of the trial of this case on March 24, 1916, Melville Dunkley testified:

"Q. Where does Stewart Campbell live?

"A. I saw Stewart Campbell in Kalamazoo a

few days ago or a few weeks ago; otherwise, I have not seen him since he left town suddenly.

"Q. *Did you discuss this case with him?*

"A. In Kalamazoo?

"Q. Yes.

"A. No.

"Q. *Did you mention to him you would like to have him as a witness?*

"A. No" (R. 431).

No, they did not mention the suit to him and, no doubt, were sincerely hopeful that Campbell would never hear of it or the defendant hear of Campbell. No, they did not think of it, because, no doubt, they had already planned to bring out to California, a witness with a more open mind, a witness who was only a nineteen-year-old boy at the time of the transactions regarding which he was to testify; a witness who would remember what he was told to remember. The Dunkleys fully appreciated the advisability of having Harry Schau come all the way out here from Michigan to testify in preference to having Stewart Campbell come over from Berkeley to testify in their company's behalf. They did not want the best witness; one who necessarily knew and remembered the truth and could not be seduced into giving false testimony. If the Dunkleys wanted a truthful witness, necessarily known to them to have knowledge of the facts, how natural it would have been for at least one of them to mention this case to Campbell and suggest his appearance as a witness herein.

We shall hereafter comment on Campbell's testimony in reference to his designing and originating some of the machines built by him. A detailed analysis of said testimony will show that there is absolutely nothing improbable about his contentions in that regard. We shall discuss said testimony, not because it is material to defendant's case whether he did or did not originate said machines, but because we deem it due to Campbell to so discuss the same in view of the criticisms thereof by the lower Court.

Regarding said peach peeling table, Campbell said:

"Q. During the months of July and August, 1903, what were you doing in that company's employ?

"A. In July and August?

"Q. 1903?

"A. I was constructing a peeling table, a peach peeling table and filling table" (R. 524).

"Q. State, if you know, the extent to which that table was used in the peach season of 1903?

"A. Well, it started with pears and it ran through the season of peaches.

"Q. *What methods were used in that cannery of the Dunkley Company at South Haven during the year 1903 for peeling peaches commercially?*

"A. *Hand peeling and peeling with hand machines.*

"Q. *Any other methods used that season?*

"A. *No other method commercially*" (R. 525).

In fixing the exact dates, when the lumber for said table was purchased in July and August, 1903, from the John F. Noud Company, of South Haven, Camp-

bell referred to his diary (R. 399). The table was completed in August, 1903 (R. 526). It will be noted that Campbell does not hesitate to state from what firm the lumber for said table was bought, notwithstanding the books of said firm. the John F. Noud Company, can be used to check up the accuracy of his testimony.

To resume the narrative of events occurring at the South Haven cannery, we quote from the testimony of S. J. Dunkley:

"Q. In 1903 you put up pickled peaches?

"A. In 1903, we started to get ready to put up pickled peaches; as we were using so many more peaches, we did not know what to do with the little fellows.

"Q. Did you do any experimenting with pickled peaches about the month of August, 1903?

"A. I could not say; *it seems to me that is the year we did.*

"Q. Who had charge of that work?

"A. I could not say exactly; we had so many there.

"Q. William Brunner had charge of that work, didn't he?

"A. *He was hired to look after pickled peaches, yes*" (R. 493).

We wish to call the Court's attention to the reluctance with which both the Dunkleys gave any information which would enable one to check up the truth of their story. The foregoing quotation is an example of such reluctance. At this time, we wish to call attention to the fact, that both the Dunkleys

and Schau testified *before* Campbell, Brunker and Mapes took the witness stand and we feel quite certain the opposing parties did not know beforehand that said witnesses would be called by defendant or were even known to defendant. Neither of the Dunkleys nor Schau nor any other witness were called to rebut the testimony of Campbell, Brunker or Mapes.

Regarding the work done by him after helping Campbell install the seamers and vacuum machines and build the peeling table, Brunker said:

"Q. What was the next work that you did after helping him on that table?

"A. Well, there was some pickled peaches that we tried out; Mr. Dunkley had been working on them and he asked me to take hold of them, and they were to be packed with skins on; they were not to be peeled.

"THE COURT—Q. What is that?

"A. They were unpeeled peaches; and I worked in there a little while and then when he expressed himself satisfied, he said he would like some of it glassed with skins off, and *he had heard of some packer who had tried the peeling of peaches with lye and it did all right*; and I suggested that we might try that, and he said, all right, to go ahead and get some lye and try it, and in a day or two after that I asked him to show him what the results of my experiments were, and I just took some of these and put them in a solution and put them undr water and rubbed the skin off with the hand; he said, '*it is going to work all right, we will have to get a machine for that, for what you are doing with your hand.*' I said I could not build a machine and he said, 'that is

all right, we will get Stewart to build that'; that was Campbell; he was superintendent; and he says, 'you and Campbell get together and you show him what you want done and he will make a machine to do it.' So the next day Campbell came in to me and told me that Mr. Dunkley had said that he was to build a machine. 'Now,' he said, 'I want to see what that machine has to do,' and I prepared some peaches as I had done before, and took a brush and brushed the skin off instead of rubbing it off with my hands, and he says, 'I can make a machine to do that all right.'

"THE COURT—Q. Mr. Campbell said that?

"A. Yes.

"MR. WHITE—Q. What kind of a brush did you use?

"A. I bought it in a paint store, some little brush that painters use; I don't know exactly what kind of a brush it was; I didn't know what nature of brush I would need; I just wanted it.

"Q. Go on with your story as regards what followed?

"A. Then Mr. Campbell and I were rooming together at the factory and that night after that he told me 'I have thought of half a dozen ways of peeling peaches, but,' he says, 'there is one way I intend to do it,' and he went on to describe the machine and the description he gave me exactly tallied with the machine he afterwards built.

"Q. What kind of a machine did he afterwards build?

"A. He built a machine, like that, with a carrying belt to carry the peaches along and the brushes alongside were 3 feet long; they revolved and peeled the peaches that were carried through on that belt" (R. 599-601).

On cross-examination, Bruner said:

"MR. CHAPPELL—XQ. Do you remember what time in the month of August you made the first test of the lye?

"A. No; I don't remember the date at all; I could not give you the dates at this time.

"XQ. You had been working at peaches some little time before that matter came up, had you?

"A. Yes, we had worked I think about a couple of weeks.

"Q. And then after you had been working at peaches a couple of weeks Mr. Dunkley discussed this matter with you?

"A. Yes, he discussed the matter with me.

"XQ. And then after that Mr. Campbell came to see you?

"A. Yes" (R. 623).

* * *

"XQ. Did Campbell seem to have any ideas about a machine when he first saw you?

"A. Not when he saw me first; in the first place when he came to me he said that Mr. Dunkley had sent him to me to see what was needed with such a machine; so when I showed him he said 'I can make a machine that will do that.'

"THE COURT—Q. Immediately?

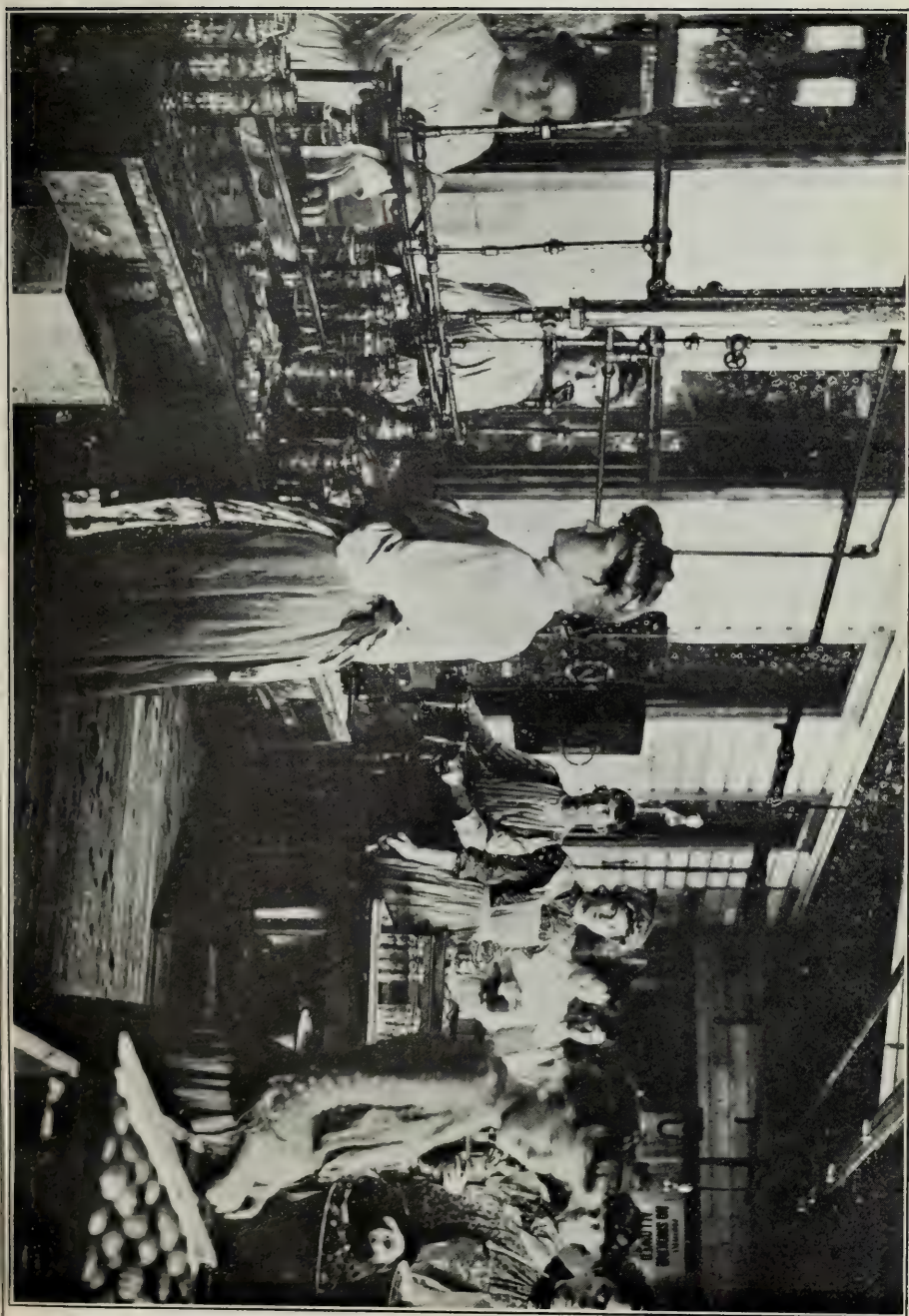
"A. Immediately.

"MR. CHAPPELL—XQ. What did you show him—what had you been doing in the meantime?

"A. I was working on some other work at the time and I stopped that and made some of the solution and put a dozen peaches into it and then took them to the sink and took the brush I had and turned the faucet and brushed them off and he said 'that is what your machine has got to do'; he says, 'I can make a machine that will do that'" (R. 609).

On the opposite page is a cut of the photograph of the preserving room, where Bruner did some of his work.

The lower Court's question as to whether Campbell "immediately" said he could make a machine to do the work indicates its doubt as to the probability of Campbell making such a statement. It will be noted that Campbell, at this time, did not say *how* he could make such a machine; he merely expressed the opinion that he *could* make a machine to do the work Bruner was doing by hand, to wit: *turning the peach over under a jet of water and, at the same time, brushing it.* We respectfully submit that no mechanic, of the most ordinary ability and having had any experience in a cannery, where cans and fruit were being automatically handled and conveyed from place to place, would have expressed any doubt as to his ability to make such a machine. At the very moment when said conversation took place, Campbell's peach peeling table was being used and said table embodied a conveying belt for carrying the peeled peaches along under sprays of water to wash them, as indicated on "Defendant's Exhibit T." There was, therefore, no reason why he should, at the time of said conversation, express anything but confidence in his ability to make a device to perform the exceedingly simple operation being performed by Bruner, as such a device would involve merely the addition of rotating brushes to the said peeling table comprising a con-



veying belt and perforated pipes. He did not pretend, at that time, to have any definite ideas as to the exact means he intended to use to accomplish his purpose, but it was undoubtedly evident to him that the problem presented was not a complicated one, hence his confidence in his ability to solve it. Any one, having any experience with mechanics, knows the facility with which a mechanic off-hand suggests various mechanical ways of performing any specific function. A mechanic deals in mechanical elements and mechanical movements just as a writer deals in words. Ask a writer to express, in words, any particular idea, and he will invariably display a confidence in his ability to do so, even though, on the spur of the moment, he does not suggest any particular combination of words expressing such idea. The same is true of a mechanic, when asked to express, in mechanical elements and movements, any particular idea of means. Of course, it is undoubtedly true that many ideas of means are most difficult to practically express in mechanical elements and movements and, in order to so practically express them, a mechanic must work months and sometimes years. On the other hand, there are many ideas of means capable of being expressed by the use of the most simple mechanical movements. The said peach peeler is one of these. It embodies mechanical movements of the most simple character and in very general use. For years, there have been in use, fruit

graders embodying traveling belts flanked by rotating rollers; fruit and vegetable washers, embodying traveling belts flanked by rotating brushes; paper making machines, embodying traveling belts for carrying the pulp in combination with rollers for operating thereon; bottle washers, embodying traveling belts flanked by rotating brushes, etc., etc. The large number of similar operating devices are referred to in the Dunkley file wrapper. In view of the foregoing, it is apparent that said simple mechanical elements and movements are embraced in the "vocabulary" of the ordinary mechanic just as the simple words of any language are embraced in the vocabulary of one familiar with said language; and, in each instance, the same are available for use in expressing any idea.

Regarding the peach peeling machine made by Campbell after such conversation, Brunner said:

"XQ. Where did you see the machine made by Mr. Campbell for the first time?

"A. I seen it from its beginning; I saw him make or get the brushes that were to be fastened on the belt, that is, to make them carry; that was the first thing; then he riveted them on to the belt and then he made the stand for it, and he called me one day to show me how it was going to work.

"THE COURT—Q. Did he make the rotary brushes also?

"A. No, he bought them in Chicago; he showed me a drawing of them before he sent them.

"XQ. He did make a drawing of them, did he?

"A. Just a little sketch on his letter which he was sending.

"Q. He didn't go to Chicago to get the brushes?

"A. I understand he did afterwards; but he wrote a letter first.

"MR. CHAPPELL—Q. How did you happen to know of his going afterwards for brushes to Chicago?

"A. Because when he came back he told me; he said 'I had to go there myself, I could not get them any other way' " (R. 617).

* * *

"XQ. What do you know about the water there?

"A. We knew that there was a whole lot of water to be used in the peeling of peaches.

"XQ. Can you describe how that was to be used?

"A. Yes, there was to be one pipe between the two revolving brushes and one under them, and they were all to play on the peaches as they went through on the carrying belt.

"XQ. Did he describe that all to you before he made the machine, how he was going to do it?

"A. *Yes, except it was an afterthought, the water on the top was an afterthought; all he intended using in the first place was two, and then when he had the machine made he said, 'I guess we had better put another pipe on top to play down on the peaches.'*

"XQ. When did he put the pipe on top, do you remember?

"A. When he finished the machine, as far as it was finished; when I saw the machine of course it was very crude when I was there, it was not finished.

"XQ. When did he get that machine finished?

"A. It was the latter part of the peach season when he tried it out; there was not over half of the help there when we tried it; the season was just coming to a close.

"XQ. How many of the conveyor belts were there in the machine when it was completed?

"A. Conveyor-belts?

"XQ. Yes?

"A. *There was only one conveyor-belt; we had no line conveyor, just the machine.*

"XQ. You did not hear him say anything about a machine with two conveyors in it?

"A. No, but he told me that if he ever made it again he would make two or three in a row; that is what he said then; he said of course it would be a practical machine.

"XQ. Did you examine the machine carefully after it had been operated to see just what it was?

"A. Yes, quite critically because I put through the peaches and it done the work so well I thought that was quite plenty.

"XQ. But you didn't get into the insides of that machine to see just how it was done?

"A. Well, I saw it in the course of being built and I thought I knew a good deal about it; but I have no mechanical skill, you know, and I could not do anything with it.

"XQ. *Was there any lye-tank for delivering the peaches into this belt machine?*

"A. No.

"XQ. Where was the machine set up and operated?

"A. Just in front of the engine room on the lower floor of the factory; they had to take it there to get the end of the shaft out of the engine room to get power.

* * *

"XQ. *You are sure you saw only one machine there, are you?*

"A. Yes.

"XQ. How many peaches were peeled on it when you saw it?

"A. I peeled three bushels myself.

"THE COURT—Q. You ran the machine after it was built, did you?

"A. Mr. Campbell ran the machine and I prepared the peaches and put them through.

"MR. CHAPPELL—XQ. That was all the machine was operated when Mr. Campbell operated it?

"A. Yes" (R. 622).

"MR. CHAPPELL—XQ. Do you know what a friction gear is?

"A. Yes, I know, because he told me at that time.

"XQ. Did you see any friction gears used by Mr. Campbell?

"A. Yes; and he said if he ever made another machine he would never have a friction gear on it; *but there was a friction gear on the one he made, a friction pulley; that was for the driving of the revolving brushes.*

"XQ. Did he make that gear himself?

"A. I don't think he made it; I think he got it made up town somewhere, I don't know that either. I never saw it until it was on the machine.

"XQ. Was there any belt to drive this machine?

"A. Yes, there was a belt from the driving pulley and then there was a belt from that to drive the *friction* pulley.

"XQ. Where was the connection to the water?

"A. He got that—in the tryout we had a rubber hose there, and I think that we got the water from the engine room; I am not sure about that either, but it was brought to the machine by a rubber hose.

"XQ. Then after that how was it done?

"A. It never was done after that as far as I know; so far as I know, I put all the peaches through it that was ever put through it" (R. 626).

It will be noted that Brunker says there was no lye-tank for the machine, thus confirming the testimony, on that point, of S. J. Dunkley.

It will also be noted Brunker states that *friction gears* were used in the model machine. Regarding the use of same, Melville Dunkley testified:

"XQ. Are you willing to state that that first machine was not driven by use of friction gears?

"A. *No, I would not say.*

"XQ. As a matter of fact, it was driven by a friction gear, isn't that correct?

"A. *I don't know.* I could not say; I have an idea it was driven by gears, but as to the manufacture, the building of that machine, I could not remember" (R. 436).

S. J. Dunkley, the alleged inventor, on the same subject, said:

"XQ. What kind of gears were used in that model?

"A. *I could not say that*" (R. 493).

In our opinion, the failure of the Dunkleys to recollect the character of gears used in the model machine, was not due to any actual lapse of memory on their part, but was merely due to a reluctance to *admit* the use of friction gears therein, whereas, on the other hand, they were afraid to positively *deny* the

use of the same. Throughout their testimony the same reluctance to admit facts, of which they dared not deny the existence, is discernible. Said reluctance is especially noticeable in regard to their pretended failure to remember who worked on and operated the machines and from what firms parts thereof were bought.

The friction gears, used in the model machine, were made by E. B. Mapes in his machine shop in South Haven. Mapes' original book of entries, containing his accounts with the Dunkley Company, was offered in evidence as "Defendant's Exhibit BB, Mapes' Account Book." (R. 649.) Mapes said:

"MR. WHITE—Q. State whether or not you find in that book an account with the Dunkley Company for the year 1903, and, if so, on what page you find it?

"A. I could not give you the page, that is, I could not, without referring to the book.

"Q. Turn to page 77.

"A. Yes, I have an account here.

"Q. How is that account headed?

"A. Dunkley Canning Company.

"Q. What is the first item—under what date?

"A. For tapping in 3 three set screws, 35 cents.

"Q. What is the date of that item?

"A. July 4.

"Q. Of what year?

"A. 1903.

"Q. Now, begin with the item opposite September 28 and please (read) the items in that account up to and including the item opposite October 6; just read the date and the entry and the amount?

"A. September 28, to 2 iron pulleys for *peach-washer*, \$2; 28th again, 6 hours' time on *peach machine*, \$2.40.

"September 29, 6 ditto, \$2.40.

"The same item on the 30th, 6½ hours' work and 2 pounds of babbitts, the total would be \$3.00.

"October 1, 1½ hours' time, 2 ⅜ set screws, 70 cents.

"October 1, bore 2 pulleys, 60 cents.

"October 3, cutting shaft one hour, 40 cents.

"October 5, 3 hours' time, \$1.20.

"Then it is carried over to page 87; *October 6, Mapes' time on friction, 8 hours, \$3.20.*

"*Leather for friction, \$1.00.*

"Q. That is sufficient. Now, state if you know what that item of friction refers to?

"A. Well, that item of friction refers to 3 pulleys really, the friction surfaces that come in contact with one another.

"Q. *Who gave you the order to make those friction pulleys?*

"A. *Mr. Stewart Campbell.*

"Q. Do you know what they were made for?

"A. Yes, I know what he told me they were for.

"Q. State whether or not after making them you ever saw them?

"A. I saw them on a machine they were put on.

"Q. *What was that machine?*

"A. *It was supposed to be a peach-washer*" (R. 637).

"MR. CHAPPELL—XQ. When did you see the peaches put through that machine?

"A. Well, I could not give you the exact date; I saw it some time in the fall after that.

"XQ. The fall—after October, you mean?

"A. Yes, after the stuff was made, but I was in there later on.

"XQ. When did you see a machine before that?

"A. *I never saw one before that; that was the first sight of the machine*" (R. 639).

Regarding the test of the model Exhibit 10, after its completion in October, 1903, Campbell said:

"Q. Before you go to your other machine I will ask you to state whether or not any test of this first machine was made, and if so what were the circumstances?

"A. Yes, we made a test right at the finish; I ran it through with Mr. Brunker; Mr. Brunker prepared the lye and peaches and I poured them into the end of the machine, and they shot through and dropped out into a tank of water and they were perfectly satisfactory in every way; that is it did good work, and I showed it to Mr. Dunkley and he seemed impressed with it and said it was all right; some time after that he suggested that we build a machine that would do just about three times as much.

"Q. What was this vessel in which Mr. Brunker heated the solution for the peaches at the time of the test?

"A. I am not clear as to that; my recollection is that it was a pan.

"THE COURT—Q. A pan?

"A. Just a pan.

"MR. WHITE—Q. Where was the solution heated, by what means, at that test?

"A. It was heated on a gasoline or gas stove, I don't know which now, right in the same room where I made the test.

"Q. What connection if any between the stove and the pan thereon and the machine which was being tested?

"A. No connection between them; the stove set, I should say, about 30 or 35 feet away from the machine, I guess, when the lyeing was done, between the office and the stairway, going up from the room.

"Q. *About what time was this first test of the machine made?*

"A. *It was made along late in October.*

"Q. *In what year?*

"A. *In 1903.*

"Q. Now to what extent was the machine tested out with respect to the number of peaches put through that machine?

"A. I don't remember exactly, two or three bushels.

"Q. Then after that when was this machine used again?

"A. I don't remember of that machine ever being used after that.

"THE COURT—Do you mean to say it never was?

"A. It never was to my knowledge" (R. 532-534).

That the model Exhibit 10 was never used after 1903, is also shown by the testimony of Melville Dunkley, who said:

"XQ. Was it ever used after 1903?

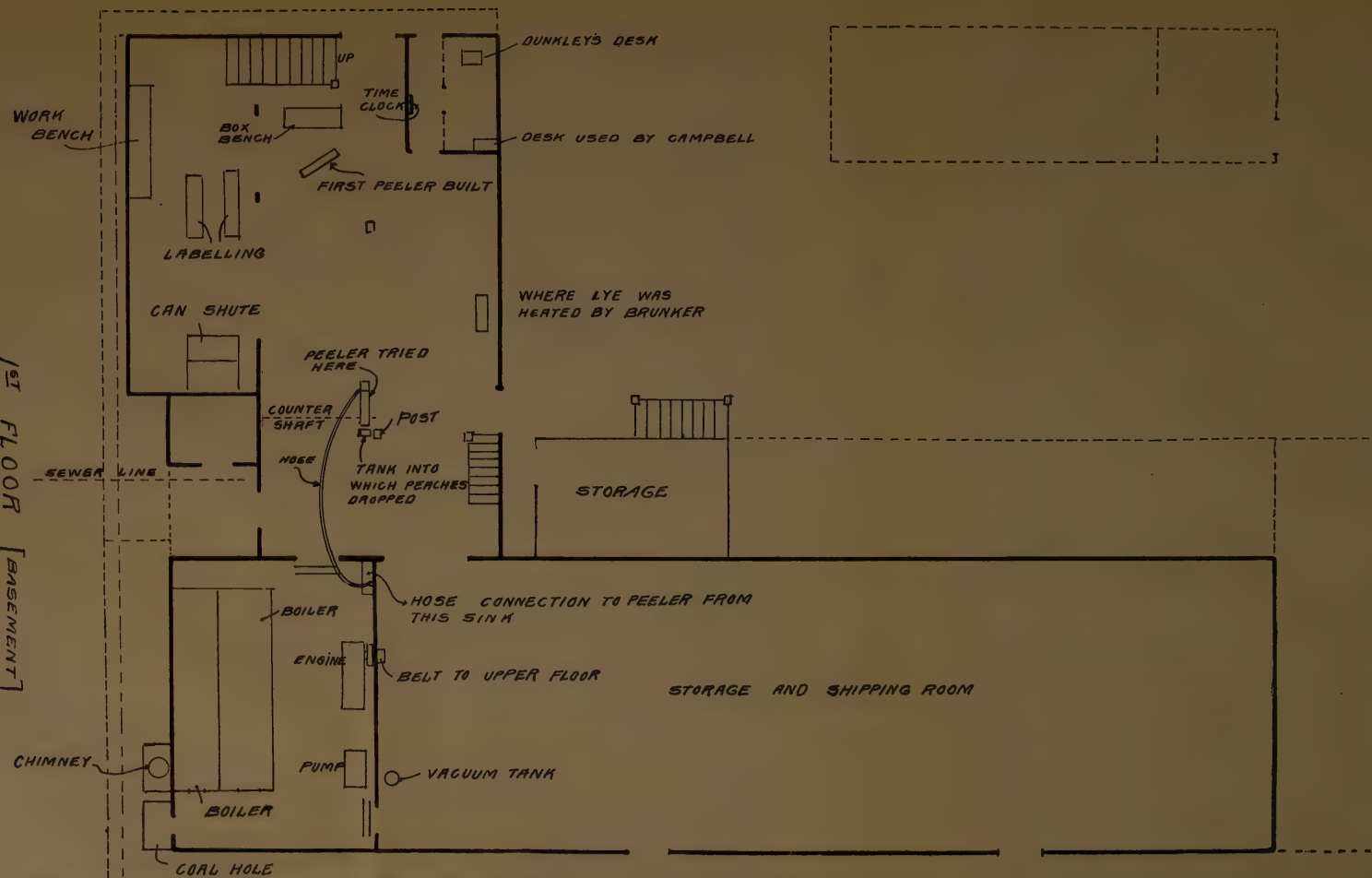
"A. I think not.

"XQ. Are you sure?

"A. *I am quite sure*" (R. 443).

The foregoing merely shows the experimental nature of said model and that it was never built with the idea of using it commercially. As said by Brunker, it was a crude device and was never used commercially.

1ST FLOOR [BASEMENT]



1ST FLOOR [BASEMENT]

WORK
BENCH

BOX
BENCH

FIRST F

LABELLING

CAN SHUTE

PEELER
HERE

COUNTER
SHAFT

HOSE

TAIL
WHIP
DRUM

SEWER LINE

BOILER

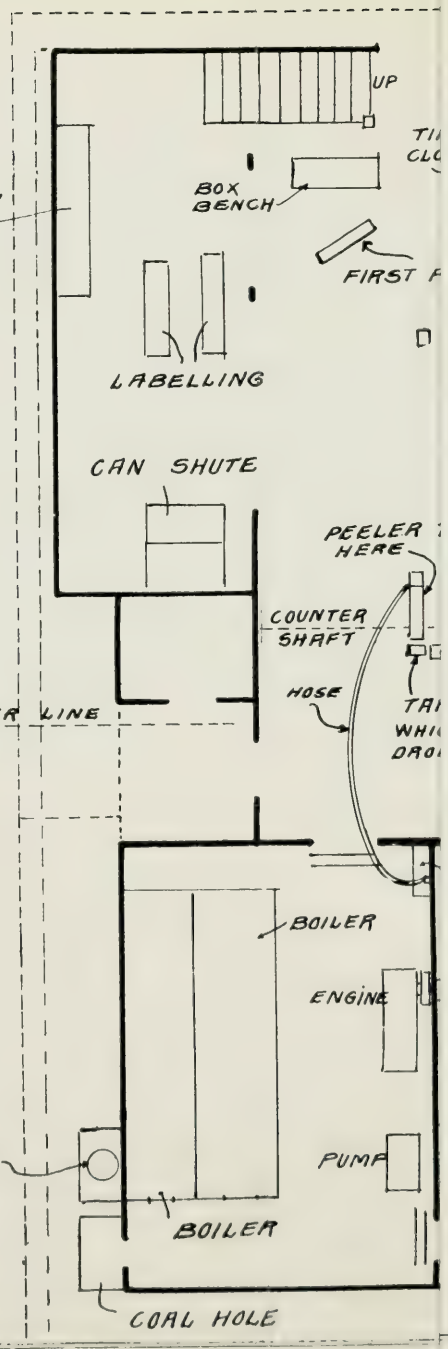
ENGINE

PUMP

CHIMNEY

BOILER

COAL HOLE



On the opposite page is a reproduction of an enlargement of one of the Campbell drawings forming part of "Defendant's Exhibit AA." (R. 544.) Such drawing discloses the floor plan of the basement in the Dunkley Company's cannery in South Haven in 1903. On the plan are indicated where model Exhibit 10 was built by Campbell and where it was first tested in October, 1903.

Regarding the manner in which the friction gears were mounted in the model machine, Campbell said:

"A. The mode of fastening them there, I cannot remember exactly; but I think they were on a kind of wooden bracket, I would not be certain. That part of it I don't remember. * * *

"A. * * there is (are) holes on the top of that back frame that there might have been a bracket extended out to hold it, but I could not say; *my recollection was that there was wooden brackets put in there between the top and bottom and extended out and bolted, like sawed out of a plank; I could not say positively; * **" (R. 592).

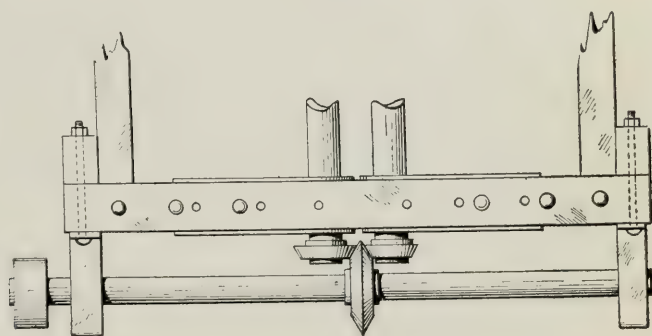
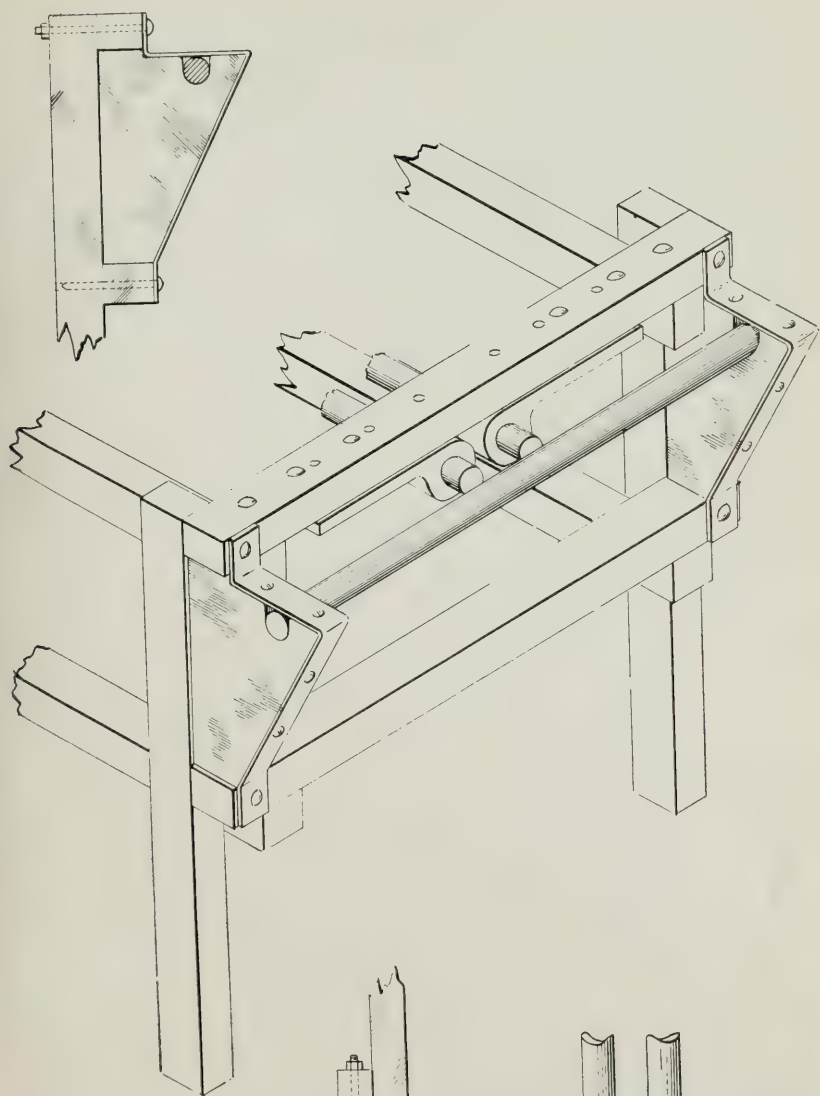
For the purposes of the argument, we had made three drawings illustrating the friction gears and the manner in which they were mounted on a shaft supported in the two wooden brackets, according to Campbell's recollection, although he was not positive as to such details. Said drawings are reproduced ¹³⁴ on the opposite page. The bolt holes in the frame, as mentioned by him, are in the Model Exhibit 10 and there appears to be no reason to doubt the accuracy

of his recollection. Campbell's refusal to state positively the precise manner in which said gears were mounted in the model machine, although it would have been a simple task for him, or any ordinary mechanic, to suggest any number of ways of attaching them to the machine, merely indicates the sterling honesty of the man. Throughout his testimony, it is to be noted he does not hesitate to frankly so state when he fails to remember any fact inquired about. Neither of the Dunkleys even remembered what kind of gears were used in the model machine. As said by the alleged inventor, S. J. Dunkley, on said point:

"XQ. What kind of gears were used in that model?

"A. I could not say that" (R. 493).

The foregoing comprises an analysis of all the proofs respecting the date of building of the Dunkley experimental model machine. As Dunkley claims said model was made *in the same month* in which he *conceived* the invention (R. 479 and 495), it is quite apparent that Dunkley's *date of invention* must be deemed, for all practical purposes, to be *the approximate date of the commencement of said model machine*. We believe we have demonstrated that the building of said model machine did not commence until after the beginning of the 1903 peach season in August of that year, and that it was not completed until after October 6, 1903. Of course, the Dunkley



testimony, in the Dunkley-Beekhuis interference proceedings, fully corroborates our contention that said model was not made until 1903. It is to be noted, however, that, in said interference proceeding, Dunkley fixed his *conception date* as August, 1902. The testimony of Campbell and Brunker herein, proves that the *conception* of the invention did not occur until one year later, to wit, in August, 1903.

Many patent attorneys have noted the tendency, on the part of inventors endeavoring to carry their dates back of the true dates, in order to overcome an anticipation, to carry them back just one year or just two years, and so on. By so carrying the dates back, the inventor's whole story need be changed only in respect to the *year* in which any event occurred, but the sequence of events is not thereby changed or disturbed or the particular month, in which any event occurred, changed. It is, therefore, apparent that, by carrying a whole series of events back one year or for some multiple of a year, the witness, without much chance of being tripped up, is enabled to protect himself against the most severe cross-examination by one not knowing the truth. Fortunately for us, we knew the truth in the present case.

In the interference proceeding Dunkley knew, before the declaration of interference in July, 1909 (R. 831), the filing date of the Beekhuis application. As said date was May 25, 1904, Dunkley undoubtedly thought that, in order to win, it would be sufficient

to carry back the date of completion of his model machine to July, 1903, from October, 1903, the true date of completion. However, he apparently thought it prudent to carry the *date of conception* back a *whole* year to August, 1902, and he evidently felt secure in doing so, because he could rely merely on his own and his son's testimony to prove such *date of conception* without much chance of the opposing party disproving the same.

DATE OF BUILDING DUNKLEY'S FIRST COMMERCIAL MACHINE.

After the test of the model machine in October, 1903, Campbell started to work on the first commercial machine. Said machine comprised three endless brush belts for respectively conveying three lines of peaches between sets of rotating brushes and, therefore, said machine was spoken of as a "*three-line machine*." Campbell made the drawings for the lye-tank to be used with the brush-spray mechanism therein and the same were turned over to the Clark Engine & Boiler Company of Kalamazoo for use in making such tank. (R. 537.) As said by Melville Dunkley:

"XQ. Did Mr. Campbell make the drawings for the lye-tank for the first commercial machine?

"A. No, I do not think there were any drawings made—for the first commercial machine?

"XQ. Yes.

"A. *He might have*" (R. 458).

Regarding the date when said lye-tank was delivered by the Clark Company, Campbell said:

"A. It was delivered January 30, 1904.

"Q. At what place was it delivered?

"A. At the factory in Kalamazoo" (R. 537).

The gears for the first commercial machine were purchased by Campbell in Boston, Massachusetts, from the Boston Gear Works in December, 1903. (R. 538.) As said by S. J. Dunkley:

"Q. In the month of December, 1903, did you buy any gears from the Boston Gear Works at Boston?

"A. I shouldn't wonder but what we did, for we were building some machines, *I think Campbell was at that time*; I think he was building a complicated syruper-machine" (R. 500).

The carrier-chains, used in the lye-tank for such commercial machine, were purchased in part from the Jeffery Company, Chicago, and part from the Weller Manufacturing Company of Chicago. (R. 540.) Campbell furnished the foregoing information regarding the various firms from whom said parts of the commercial machine were purchased. The Dunkleys, on whom was the burden of proof, were quite reluctant to give any information which could be used to check up the accuracy of their testimony. They fully appreciated the wisdom of the saying that "Silence is golden." Regarding the construction of said machine, Campbell said:

"Q. Now go on with the history of any peach-peeling machine you had knowledge of at the time at the Dunkley factory?

"A. After that season, after the tryout of the small machine, I had several machines on hand to build, and *one of these was a triple machine, peach peeling machine*. The lye machine I built; I made the drawings of the frame work of the triple machine, I don't remember whether I built the frame work or had it built, but I think we had it built in Kalamazoo and shipped over to the factory; but that was constructed during what we call the winter season or the season between the canning seasons and was shipped down to South Haven along with other machines and I erected them and finished them there and they were put into operation along about the 1st of September—along in the 1st of September.

"Q. In what year?

"A. Of 1904, the following year.

"Q. Up to the first of September, 1904, how many peach peeling machines had you built there at the Dunkley factory in Kalamazoo or South Haven?

"A. *Just the two, the single model and the triple model*" (R. 536-7).

On the same point, Melville Dunkley said:

"XQ. *Prior to November 1, 1904, had the Dunkley Company built more than these first two machines, to wit: the experimental model machine and the first commercial machine?*

"A. *I could not say that they had*" (R. 449).

On the same point, S. J. Dunkley said:

"XQ. *When was the third peach peeling machine made by the Dunkley Company?*

"A. *The third?*

"XQ. *Yes, counting the experimental model as the first?*

"A. *I could not say as to that*" (R. 500).

As indicating Melville Dunkley's reckless disregard for the truth, we call attention to his direct testimony to the effect that, in addition to the experimental model machine and the first commercial machine, more of such peach peeling machines were built in the winter of 1903 and 1904. He says:

"In 1903 and 1904, that is in the winter of 1903 and 1904 we built more of the machines and installed them in the South Haven factory. These first two or four machines were built with wooden supports, etc." (R. 417).

On cross-examination, he was compelled to admit that, up to November 1, 1904, only two of said machines had been built, to wit: the experimental model machine and the first commercial machine. (R. 449.) Can such character of testimony, even though it were not flatly contradicted, be properly held to establish a case *beyond a reasonable doubt* or a case *substantially free from doubt*?

Regarding the installation and first use of the commercial machine, Campbell said:

"A. The first commercial machine was placed on the second floor right in the same position as this peach peeling table; *they took out a great part of this peach peeling table to place the peel-*

ing machine and the lye machine and the pitters, and they delivered the stuff onto the remainder of this peach peeling machine (table) as a sort of *inspecting* table, but I don't remember just how much was left, probably twenty or twenty-five feet.

"Q. When was that commercial machine *first used*?

"A. I left there the 3rd of September, 1904; I tried it out there; we probably ran anywhere from 5 to 20 bushels, I could not say exactly the number of peaches, through it.

"THE COURT—Q. When was it put in operation?

"A. The operation of the *try-out* is all I know about, *it was not in regular use for the season when I left there.*

"Q. When was it put into operation, I say?

"A. In September—well, August, probably—a couple of days before I left—it would be in August of 1904; the commercial machine" (R. 541-2).

Regarding the date when Campbell left the Dunkley Company's employ, S. J. Dunkley said:

"A. * * * he left in August, 1904; * * *"
(R. 432).

It will be noted that the very last thing done by Campbell, before leaving the Dunkley Company's employ in 1904, was to try out the first commercial machine. It is apparent, therefore, that he cannot be mistaken as to the date of completion of said machine *just prior thereto*. Of course, Bruncker's admitted period of employment, in 1903, absolutely fixes the



date when the model machine was made, as it was made while he was in South Haven. Furthermore, Brunker could not be mistaken regarding such model machine, as it was the only peach peeling machine there while he was there. As he said:

"XQ. You are sure you saw only one machine there, are you?

"A. Yes" (R. 622).

Brunker further identifies said model machine as having only *one conveyor belt*, and states *no peaches were commercially peeled on such a machine while he was at South Haven*.

On the opposite page appears a cut of the first commercial machine which contained three brush belts. Said cut is a reproduction of "Defendant's Exhibit S." (R. 445.)

The *logic* of the sequence of events, as testified to by Campbell, Brunker and Mapes, is fully corroborated by the filing date of the Dunkley application for the patent in suit, to wit: November 29, 1904. In other words, the filing of the application on that date was in strict accord with the ordinary rules governing human conduct. The experimental model machine was built during the 1903 peach season and tested in October, 1903, *near the end of that season*. It was, of course, impossible to then build and complete a commercial machine in time for use during such season. Furthermore, it was perfectly natural for S. J. Dunk-

ley, even though he fully believed he had a patentable machine, to delay filing an application for a patent until he did have a *complete* working machine upon which to base his application for a patent. It will be recalled that Melville Dunkley said the Dunkley patent drawings are based upon such first commercial machine. (R. 448.) When S. J. Dunkley did have such commercial machine completed, about September 1, 1904, it was perfectly natural for him to promptly arrange for the patenting of the same and, therefore, in getting his application on file on November 29, 1904, a short time after the completion and public use of such commercial machine, Dunkley was acting in accord with ordinary human conduct.

We have heretofore commented on the fact that Campbell did not hesitate in giving the names of the various business houses from whom were bought the parts of the model Exhibit 10 and of the first commercial machine. No one, not feeling absolutely sure of his ground, not feeling absolutely certain of the substantial accuracy of every statement made by him, would have followed such a course. Regarding his Eastern trip, made in February, 1916, at the request and expense of defendant and, part of the time, in company with the writer of this brief, Campbell said:

“MR. CHAPPELL—Q. You have been in Kalamazoo and in South Haven recently, have you not?

"A. I have been in Kalamazoo, yes, in February.

"Q. What was the purpose of your trip there?

"A. I went there to check up my ideas on this, and secure what evidence I could get in regard to it.

"Q. Where did you go?

"A. I went to Chicago, first; then I went to South Haven, and I went up to Kalamazoo and up to Lansing, down to Detroit and back again; I did not go to Detroit particularly on this.

"THE COURT—Q. On whose behalf?

"A. I went on my own behalf to Lansing and Detroit.

"Q. Did you make this trip back on your own behalf?

"A. No, I went for Mr. White.

"Q. You were sent back?

"A. Yes.

"MR. WHITE—Q. Who was with you on the trip after you got to Chicago?

"A. Mr. White was with me from Chicago.

"THE COURT—Q. You went at their expense?

"A. Went at their expense.

"MR. WHITE—We employed him for the purpose of the investigation and assisting in it.

"MR. CHAPPELL—Your memorandum was not quite sufficient to refresh your recollection, then—is that right?

"A. It proved that my recollection was correct in every way.

"Q. In what way did it prove it, if I may ask?

"A. *It proved it by all these details, the stuff that I bought in different places checked up correct with my memory as to the time, every one of them, without exception*" (R. 587).

Campbell's Eastern trip, in and by itself, corrob-

rates his testimony herein. His efforts, on said trip, to locate and secure corroborating documentary evidence is in marked contrast to the attitude of the Dunkleys, as expressed in S. J. Dunkley's testimony:

"MR. WHITE—Q. Have you made any effort to secure any records proving any of the dates regarding the making or using of any of these peach peeling machines and if so, what efforts have you made?

"A. I do not remember making any particular efforts. I think my son did" (R. 503-5).

A man does not search for genuine documentary evidence to prove falsehoods. A man, when telling a series of falsehoods, does not refer to numerous places where documentary evidence can be located and used for checking up the accuracy of every statement made by him and possibly even used to convict him of perjury. As stated before, Campbell's course is in marked contrast with the course pursued by the Dunkleys. He searched for documentary evidence; they did not. He specified all the firms from whom the parts of the model "Exhibit 10" and the parts of the first commercial machine were bought; they sought the usual refuge of the man not telling the truth—a lapse of memory.

Whatever reputation defendant's attorneys may or may not have for honesty and integrity, the Court can, at least, safely assume they are possessed with some degree of intelligence. Would any attorney, or any

man, unless insane, dare arrange to have Campbell, Bruncker and Mapes give the testimony they did give, if the same is false? Of course, not one of said witnesses could possibly appreciate the significance, in this case, of any date given by any one of them. In fact, no one connected with the defendant's case, other than defendant's attorneys, could possibly appreciate the significance of said dates, as the same are important solely in respect to the several dates of the occurrences pertaining to the history of the Grier invention. Neither Campbell nor Bruncker nor Mapes could possibly know, unless told by one of defendant's attorneys, that it was of any importance or significance in this case, that the Dunkley model machine was not made until 1903, or that, during the 1903 peach season, no peaches were commercially peeled on such a machine, or that all peaches, commercially peeled at the South Haven cannery in that year, were hand-peeled by women sitting at the long peeling table, or that the first commercial machine was not completed or put into use until 1904. In other words, said witnesses, unless elaborately coached, could not have misrepresented the truth in regards to all said facts so that such misrepresentation would advantage the defendant herein. Furthermore, said witnesses by reason of defective memories, could not have innocently so misrepresented the truth in regards to all said numerous facts. It would be too remarkable a coincidence for such an innocent mistake to have been made by them

and, at the same time, be of such importance in the defense of this case.

It will be noted that defendant offered in evidence numerous photographs produced by Campbell and disclosing a large number of the South Haven employees of the Dunkley Company in 1903. If Campbell was not telling the truth in regard to what machines and devices were in that company's plant in 1903, is it conceivable he would produce said photographs disclosing not less than seventy-five persons in a position to contradict him? And it is quite certain that a large number of said persons can be and will be located and will be able to testify regarding the Dunkley machines, if the Department of Justice, at the suggestion of this Court, will undertake an investigation of the facts testified to by Campbell. Furthermore, Campbell, as well as defendant's representatives, will welcome such an investigation of the truth.

Undoubtedly this Court fully appreciates the fact that parties to patent infringement suits frequently find it necessary to rely on the testimony of total strangers in regard to prior art matters. Said strangers usually have no interest in the litigation and are very reluctant even to be called as witnesses. Of course, when they are called on to give up their time in searching for evidence and giving other assistance, they usually and rightfully demand compensation for their time and trouble and for the annoyance to which they are put. In the present case, Campbell not only did a

great deal of work for the defendant, in respect to locating old photographs, documentary evidence and witnesses, and making many sketches and drawings and furnishing defendant's attorneys with an immense amount of detailed information, but he temporarily gave up his position with the Southern Pacific Company, and, in the middle of winter, made the Eastern trip in search of further corroborating proofs. He also made trips to Sacramento to locate Brunner and later to introduce him to one of defendant's attorneys. On his Eastern trip, Campbell, for a part of the time, was accompanied by the writer of this brief. For his foregoing services, Campbell received the sum of five hundred dollars and the expenses of the trips. (R. 595.) In view of the value of his services and the time devoted by him in the performance of the same, and especially in view of the necessity of having him temporarily give up his regular employment, said compensation was extremely reasonable, and one could not expect him to accept a less amount. Brunner received the sum of \$25.00, out of which he had to pay his expenses of coming here from Sacramento. (R. 630.) Although it does not appear of record, Brunner after leaving the witness stand, was paid an additional sum of \$10.00, due to the fact that he was kept away from his business a day longer than he expected. Mapes made the trip to California for the expenses of same. (R. 646.) He had never been to California and, therefore, the trip naturally appealed to him.

(R. 649.) If the said compensation of said witnesses is to be considered in respect to the weight to be accorded their testimony, then the testimony of the Dunkleys must be weighed with the fact in mind that, according to plaintiff's own showing in this Court, hundreds of thousands of dollars are at stake in this litigation. After the Grier proofs were in, plaintiff's representatives knew the case was lost unless the Dunkleys carried back the dates of Dunkley's activities respecting his invention. Therefore, regarding the Dunkley evidence on this phase of the case, the following remarks of Mr. Justice Bradley, in the case of *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S., 488, are most pertinent:

"No person accustomed to weigh the credibility of human testimony can fail to perceive the stress under which this evidence was given * * * We feel bound to put this strict construction upon the patentee's evidence because such testimony, given for the purpose that this was, is necessarily subject to the gravest suspicion, however honest and well-intentioned the witness may be."

We desire to call attention to the exhaustive cross-examination to which Campbell, Brunker and Mapes were subjected, not only by opposing counsel, but by the lower Court. Campbell was alternately questioned by opposing counsel and by the lower Court along entirely different lines of inquiry. Throughout such severe examination, Campbell quickly, frankly and

without hesitation or evasion answered every question propounded. His manner and demeanor on the witness stand is clearly indicated by his answers and remarks under a most trying ordeal. No man, not telling the truth, could have possibly testified as Campbell did. We trust every word of his testimony will be given most careful consideration. The lower Court's attitude towards Campbell is incomprehensible to us unless it can be explained as hereinafter suggested.

The questions asked Campbell, Brunker and Mapes by opposing counsel were undoubtedly prompted by information received from the Dunkleys. The nature of said questions indicates that the Dunkleys, when seated at the counsel's table, had a much better recollection of the 1903 and 1904 transactions than they did when *previously* on the witness stand. For instance, Mr. Chappell asked Campbell the following questions:

"XQ. Do you remember working at any time on a sealing material on cans?

"A. I did.

"XQ. When did you work on that?

"A. I started some of that in South Haven and finished it in Kalamazoo.

"XQ. Did you get that to work?

"A. I got my part to work, yes.

"XQ. Did the thing prove to be a success?

"A. I do not think so; I do not know; I had nothing to do with the material they were using; they would merely bring in the material to me and

have me put it on to these can tubes and order me to put it on the can tubes, and they kept changing the material all the time and I had to keep changing the machine; I do not think while I was with them it ever was a success.

"XQ. When did you work on that?

"A. I worked on that in 1903 and 1904.

"XQ. At what place did you work on that?

"A. I was working on that in 1903 and 1904; I am pretty sure it was 1903 and 1904; what place?

"XQ. Yes?

"A. I worked in South Haven and Kalamazoo on that.

"XQ. What place did you work the longer?

"A. In Kalamazoo.

"XQ. Can you indicate the particular room you worked in?

"A. Yes, my work was done in—it is the second floor, I would call it, in the building on the wing; *I had a room there all to myself with my big drafting table, architect's drafting table that I bought and placed in there to do my drafting thereon; I had that room all to myself on the second floor, and that is where I did my experimenting on that machine*" (R. 576).

The foregoing indicates the nature of all Campbell's work while in the employ of the Dunkley Company after the first month or so, when he did some electric wiring. How strange it is that the Dunkleys had so much difficulty in recollecting that Campbell built the peach peeling machines. Furthermore, how strange it is that the Dunkleys were able to produce such an insignificant bit of documentary evidence as Brunker's letter to the company, yet did not

produce documentary evidence corroborating their own testimony as to the most vital matters.

Regarding the machines built by him, Campbell said:

“XQ. Please indicate the order in which you designed those various machines to which you have referred, which first and which second, and so on?

“A. I don’t know as I could give them exactly, because I would start something and finish them after others, but the syruper was, I think, the first machine, in fact, I am pretty positive it was the first machine started, this automatic syruper in Kalamazoo; the cooker in South Haven came next; then the improvement on cherry pitters came next, as I remember; the improvement on cherry pitters was made in 1902; in 1903, cherries were pitted in Kalamazoo; then there came the peeler; wait a minute, the sorter was partly built in 1902; I won’t say built, it was devised and thought of and parts of it tried out, that is, the experimenting of how it would act on the peaches was tried out; but the sorter ran clear through this until 1904, and it was not completed then; then this model peach peeler in 1903—no wait a minute; there was a machine in 1903 for cutting celery—that was in December; the first work was done. I think, in the first part of December, 1903; so that machine must have been built before; that machine and this model peeler came pretty close together; then the lye machine; that peach pitter and the triple commercial machine were along in together, 1903 and 1904” (R. 573).

Campbell stated that he designed certain of the said machines so built by him and his contention, in that regard, was said by the lower Court to be in-

credible. *Of course, it is absolutely immaterial in this case, whether or not Campbell was the inventor of any of said maachines, even the peach-peeling machine.* Whether he or Dunkley conceived said machine in August, 1903, is of no moment. Prior to that time, Grier had two anticipating machines in commercial operation in California. Therefore, defendant made no effort in this case to establish the fact that Campbell was the one who actually did design the Dunkley peach peeler, although admittedly Dunkley told him generally to build such a machine to do the work which Bruncker had done by hand, to wit: remove the disintegrated skin from the peach by subjecting it to the action of brushes and water. That Campbell certainly worked out the details of construction of the peach peeling machine, is shown by the testimony of the two Dunkleys, both of whom were unable to give such details. S. J. Dunkley's ignorance regarding such details is indicated by the following answers given by him:

"MR. WHITE—I direct your attention to this 'Plaintiff's Exhibit No. 10' and ask you what function in the operation of the machine, did these gears perform which are on the shaft on which the pulley at the other end of the machine, is mounted?

"A. I presume, if there is gears there, to help turn the brushes.

"Q. Do you know?

"A. *No, I do not know*, it is a simple enough machine; anybody could judge by looking at it" (R. 496).

The following is an example of Melville Dunkley's recollection of such details of the model machine:

"Q. As a matter of fact, it was driven by a friction gear, isn't that correct?

"A. *I don't know; I could not say; I have an idea it was driven by gears; but as to the manufacture, I could not remember*" (R. 436).

It is sometimes a close question as to who is the real inventor of a very simple machine; the man who suggests the general idea of making such a machine to perform a certain function, or the man who, from such a suggestion, combines together the necessary, but very simple, mechanical elements and movements to perform such function. Either might well contend and honestly contend, he was the inventor. Therefore, no emphasis was placed on Campbell's contention that he designed the Dunkley peach peeler. We believe his testimony, in that regard, is absolutely true, but, as a defense, said contention was not relied on herein and was not pleaded. However, it very naturally was disclosed by Campbell when he was giving the history of the Dunkley peach peeler. Even though the lower Court was unable to give credence to such contention, there was no reason for it to reject the whole testimony of Campbell by reason thereof. As Campbell actually built the first two peach peeling machines and must have supplied many of the details of construction thereof, the lower Court could

at least have taken the view, that it was not an unnatural thing for him to really believe he invented the same, although as a matter of law, it might be considered that Dunkley's general suggestion was sufficient to constitute him the inventor.

That Campbell had the ability to invent the peach peeling machine is admitted by the Dunkleys. As stated by Melville Dunkley, Campbell was known "*as more or less of a genius*," and was actually employed to invent and develop new machines. (R. 456.) Furthermore, it was admitted that Campbell invented machines far more complicated than the extremely simple peach peeling machine, and it was not denied, that practically all his time was devoted to the designing and building of new machines.

It is admitted by Melville Dunkley that Campbell invented the complicated automatic syruper. It is also admitted by him that Campbell invented the complicated peach-pitting machine. (R. 457.) Campbell states he never completed the peach-sorting machines, originated by him. (R. 560.) Presumably they were a failure, so Campbell is not taking much credit to himself when he says he originated them. The cooker, enlarged by Campbell, was merely a wooden tank about five feet wide and eighty feet long. He thought the tank was made by the Windmill Company in Kalamazoo. (R. 575.) The water in the tank was heated by steam coils and the filled cans were carried through the water by carrier chains run-

ning over gears. It is evident that most of such mechanism, such as the chains, gears, etc., could be bought in the open market. The building of said cooker, therefore, was more of an assembling job than anything else. Campbell admits the improvement made by him on the cherry pitters was small. He says: "What little improvement I made on the cherry pitters was done at South Haven; the early improvement on the feed, the clearance of them." (R. 574.) The building of the peach peeling table required no more than the ability of an ordinary carpenter, and Campbell says he built a whole house complete in the '80's. (R. 554.) No description of the celery cutter was given by Campbell, but presumably it contained a reciprocating knife of some kind. The lye-tank for the first commercial machine was also a simple structure and certainly the brush-spray mechanism of the peach peeler was not complicated. In view of the fact that Campbell was employed by the Dunkley Company for two and one-half years and that his work, during most of such time, was the building of machines, the foregoing is not a very imposing array of devices for him to say he originated. Melville Dunkley, as stated before, admitted Campbell was known as a genius and was actually employed for the purpose of inventing two machines. It would, therefore, be somewhat surprising if, in two and a half years, he did not invent additional machines. On the other

hand, S. J. Dunkley was, according to his own statements, a very busy man during those years; too busy, in fact, to give much attention to details. He was running canneries and promoting and running steam-boat lines. Where he found the time or had the ability or experience to solve mechanical problems or work on the development of new machines remains a mystery. As between these two men, we respectfully submit it is much more probable that Campbell, the man actually working and building machines, was the one who originated all the new machines built during the period of his employment by the Dunkley Company. Yet Campbell does not pretend he originated all of said machines. He says in regard to the soup machine: “* * * that originated with Mr. Melville Dunkley, as I understand it * * *” (R. 539.) Regarding a part of the lye-tank for the first commercial machine, he said: “* * * there is one part of the peeler, of the lye-machine, the tank or the supply pipe above the lye-machine, I merely indicated what I wanted for that, a tank with pipes in it for heating; I don’t remember of making a drawing for that; we did not absolutely need any drawing; it has to be a certain size; that was constructed by some of the other help, I think; I don’t know, I have an idea that Melville Dunkley had the handling of that; I would not be certain.” (R. 585.) In respect to the peach pitters, *not* invented by him, Campbell said:

"XQ. Did you ever see any pitting machine that Mr. Dunkley had produced?

"A. I did; I don't know whether Mr. Dunkley produced it; I saw one he brought there from the Kalamazoo plant, while I was constructing the apparatus in South Haven.

"XQ. You did not have anything to do with that construction?

"A. I did not.

"XQ. When did you see that work?

"A. I saw two or three peaches run through it; two or three I say, I don't know how many; I saw a few run through one of the machines; I understood he had several; I think I saw two machines.

"THE COURT—Q. Pitters?

"A. Yes, both pitters.

"XQ. When did you see these?

"A. In 1904, while I was setting up this apparatus, this peach peeling line in 1904, along in July or August, somewhere along in 1904" (R. 567).

Of course, there were many other machines used in the cannery with the construction of which Campbell does not pretend to have had anything to do, such as the vacuum machines, the double seaming machines, the automatic canning machines, etc., etc.

In view of the foregoing, we respectfully submit there is nothing incredible about Campbell's contentions as to the inventing or designing of the said few machines *so specifically mentioned by him*, attention being called to the fact that he did not make the preposterous contention that he invented *all* the machines

in the Dunkley cannery. Therefore, we respectfully submit, the following remarks of the lower Court, brought forth by a grossly incorrect statement of Campbell's testimony, are entirely unwarranted by the evidence:

"MR. MILLER—Yes, they do; but here he was working for \$2 a day and yet he says he was the man *who invented the entire line of machinery in that factory, all of them*, not merely one; the peach-peeling machine and *all the other machines that were there*; that he invented them and that he installed them for Mr. Dunkley.

"THE COURT—Mr. Miller, I do not think you need dwell upon those features of Mr. Campbell's testimony, because it is too improbable for me to give it any credence that he had all these conceptions and was the inventor of these machines. I do not pretend to say he was not there and did not do some work on them, but that he conceived these machines right out of his own head, that is too much for my credulity" (R. 690).

In other words, it was too much for the credulity of the lower Court to believe that a man admittedly known as more or less of an inventive genius and actually employed to invent and build machines for a period of two and a half years and admittedly the inventor of the most complicated of all the machines mentioned by him as his inventions, should have invented the other few machines so mentioned by him. Why should such testimony tax the credulity of the lower Court any more than plaintiff's contention that

S. J. Dunkley was the inventor of all the inventions respectively described in the *eleven* Dunkley patents offered in evidence as plaintiff's Exhibit 9? (R. 477.)

We believe the lower Court's attitude toward Campbell's said contentions regarding his own inventions caused such Court to reject all of his testimony, notwithstanding its most vital features were fully corroborated by Bruncker and Mapes. To us, there appears no other explanation of the lower Court's decision on this phase of the case.

SUMMARY OF ANALYSIS.

The foregoing analysis of the proofs, pertaining to Dunkley's date of invention, clearly shows that said proofs, under all the decisions, are insufficient to prove plaintiff's contentions regarding said date "*beyond a reasonable doubt*," or, in respect thereto, establish a case "*substantially free from doubt*." On the contrary, we submit said proofs conclusively show said date of invention to be subsequent to the beginning of the Michigan, 1903, peach season in August of that year. We further submit, that said proofs conclusively show that the Dunkley model machine was not completed until after October 6, 1903, and that Dunkley's first commercial machine was not completed until August, 1904. *It is to be noted that plaintiff did not risk recalling the Dunkleys or Schau to rebut the testimony of Campbell, Bruncker and Mapes.*

In view of the former contradictory testimony of the Dunkleys in the Dunkley-Beekhuis interference; in view of the many vital inconsistencies in their testimony herein; in view of their inability or deliberate refusal to give most important information regarding the Dunkley machines; in view of the total lack of any documentary evidence which, on its face, corroborates any of the said testimony; in view of the inherent improbabilities of said testimony and, finally, in view of the complete contradiction of said testimony by the direct, positive and unequivocal testimony of Campbell, Brunker and Mapes, how can it possibly be said, without affronting one's intelligence, that said testimony proves plaintiff's contentions *beyond a reasonable doubt*?

"Where one seeks to carry the date of invention back of the date of an anticipating patent, he assumes the burden of proof, and must establish an earlier date, *'by evidence so cogent as to leave no reasonable doubt in the mind of the court, that the transaction occurred substantially as stated'*."

Moline Plow Co. v. Rock Island Plow Co.,
212 Fed., 727.

Has any Court in the land ever sustained a prior use defense on any such record as that pertaining to Dunkley's said alleged date of invention? As said by the Circuit Court of Appeals for the Second Circuit

in *Dey Time Register Co. v. W. H. Bundy Recording Co.*, 178 Fed., 818:

"The defendant having antedated the filing of the application by record evidence so convincing that it stands conceded, the burden is upon complainant to carry the date of invention still further back by evidence that convinces *beyond a reasonable doubt*. * * *

"The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt."

V.

PRIOR INVENTION AND PRIOR USE BY GRIER.

Before discussing the Grier invention, we desire to call attention to the fact that the use of a disintegrating solution, as a step in the process of peeling peaches and other fruit, was known many years before the Dunkley application was filed, and such a process was in common use in California in the early nineties. "Defendant's Exhibit C" (R. 873) is a copy of United States letters patent No. 511,709 issued on December 26, 1893, to Ida L. McDermett for such a process. In said patent, the patentee says:

"In carrying my invention into effect, I prepare the solution by introducing one ounce of potash and one dram of alum into one gallon of water, and boil the latter until the potash and alum are dissolved; and into this boiling solution, I place

the peaches, pears or other fruit, and subject all to agitation until the skin of the fruit commences to break or peel, when the fruit is removed through the medium of a perforated dipper, basket or strainer, and is dropped or introduced immediately while hot, into a body of cold water, which completes the removal of the skin and removes a large portion of the solution from the articles."

Said patent, therefore, discloses the process of removing the peach skin by first subjecting it to a disintegrating solution and then dropping the peaches into cold water, whereby the skin is completely removed.

The Grier peach peeling machine is disclosed in the eight photographs and drawings appearing at pages 27 to 35, inclusive, of the record herein. The said machine includes a lye tank having an endless conveyor passing therethrough. By reason of the shape of said tank, the same was usually called a "*grass-hopper*." After being conveyed through the lye-solution in said tank, the *halved* peaches were discharged into an inclined trough-like structure mounted on arms and adapted to be *shaken* horizontally with an endwise movement whereby the peaches were bounced up and down, turned over and advanced to the discharge end of the shaker, where they dropped into a tank of water. Above the shaker were located a series of nozzles from which issued the water, under pressure and in the form of spray, which played on the peaches, passing along on the shaker, and thereby removed the disintegrated skin therefrom. As stated before, plain-

tiff admits that said Grier machine embodies all of the respective combinations of elements respectively covered by all of the Dunkley patent claims in issue. Therefore, the question of identity between the Grier machine and the Dunkley invention need not be considered. It is admitted. We are alone concerned with the date of the Grier invention.

In 1902, G. E. Grier and E. A. Taylor formed a partnership, under the firm name of Pasadena Canning Company, and leased the Pasadena Packing Company's plant at Pasadena, California (R., 304). During that year and for many years thereafter, said firm conducted a fruit canning business in said plant. During the same period, Mr. Taylor was operating the East Side Canning Company in Los Angeles.

During the peach peeling season of 1902, Grier conceived the peach peeling apparatus, afterwards built by him in 1903. At the time of his conception thereof, he disclosed the same to his wife and to Clarence L. Kennedy, then in the employ of the firm, Pasadena Canning Company. In April, 1903, Grier employed W. H. Finley to build two peach peeling machines, each embodying the said invention conceived by Grier in 1902. One of these machines was built for the Pasadena Canning Company and the other for the East Side Canning Company. In said month of April, 1903, Grier bought from the Berger & Carter Company of San Francisco two grasshoppers or tanks having conveyors therein, for use in the said two peach

peeling machines then in the course of construction. Said peeling machines were completed in July, 1903, and, *in that month*, one was installed at the Pasadena Canning Company's plant in Pasadena, and the other at the East Side Canning Company's plant in Los Angeles. After the East Side Company's machine was put into operation for two or three days at its plant in Los Angeles, it was found that the city water pressure was insufficient and, therefore, a pump for use therewith was purchased by the East Side Company from the Baker Iron Works of Los Angeles. The original bill for said pump is in evidence and, on its face, shows that said pump was delivered on August 3, 1903. The Pasadena Canning Co's. machine was also put into operation the latter part of July, 1903, and both of said machines were used continuously throughout the 1903 and many subsequent peach seasons. The water pressure in Pasadena, in 1903, was about 70 pounds during most of the peach season but dropped down towards the end thereof, so, in April, 1904, Grier also bought a pump for his machine from the Fairbanks-Morse Company of Los Angeles.

In 1904, Grier built two more complete peach peeling machines and also the shaker end for another. One of these machines was sold to the Orange County Preserving Company of Anaheim, California, and the other to the G. H. Waters Company of Pomona, California. The shaker device was sold to the G. H. Waters Fruit Company of Ontario. All of said de-

vices were delivered before the 1904 peach season and used during such season and subsequent seasons.

Grier states that he worked for the California Fruit Cannery Association in Los Angeles during the years 1890 and 1891. In the latter year he helped install an apparatus for peeling peaches by the use of the lye process. It consisted of a rack, supported on a crane elevator and adapted to be lowered into a vat containing the lye solution. The *whole* peaches were put in shallow trays on the rack, which was then lowered into and raised out of the solution. The rack was then swung over another vat, containing clear water, and lowered into it and raised and the peaches then would be subjected to a stream of water from a hose (R., 302-3). In 1893, he used a similar arrangement for peeling at the Southern California Packing Company's plant (R., 304).

In 1902, Grier installed a similar apparatus in the plant of the Pasadena Canning Company, and, at the first of the peach season, peeled only *whole* peaches by the use thereof. Later in the season, Taylor told him it was just as easy to use the apparatus in peeling *halved* peaches and demonstrated such fact to Grier. Regarding such incident, Taylor said:

"A. It was in August, 1902, that I first discussed the peeling of peaches in *halves*.

"Q. Give us the conversation that you had at that time.

"A. In August, one evening, possibly between four and five o'clock, I had a lot of cling peaches

all cut ready to peel, and my cutters at that time had been working hard, and they refused to peel any more that evening, so that I thought I would put them into the lye and see if it could peel them, the same as I did the whole peaches, which I did, and washed those—instead of putting them into three tubs, after moving them out from the lye, *I set them across the tank and washed them all out with the hose*, and by the time I had them through, Mr. Grier happened along there.

“Q. Give us the conversation that you had with Mr. Grier at that time?

“A. I asked Mr. Grier if he did not think that was a good thing, and he said he thought it was; he said after they were cooked, he would like to see the peaches; about two days afterwards he came in and I went and got a can and opened it in the office and showed him, and I can remember now the smile that came over his face” (R. 379).

Immediately after said conversation, Grier changed his method of peeling peaches by *halving* them before subjecting them to the lye-process (R., 305). In reference to making such change, Grier said:

“A. I conceived the idea right then of building a machine to do the work more rapidly, and the machine that I built in 1903 was the result of that conception” (R. 305).

CLARENCE L. KENNEDY worked for the Pasadena Canning Company in 1902. Regarding the method being used at that time by Grier, in peeling peaches, he said:

“A. They had two vats; they were about 2 feet wide and about 4½ feet long, I should judge about

18 inches deep, and one of them was filled up with the lye solution and the other filled up with water, and we dipped them by means of a pulley attached to a crate or basket, and—we lowered two baskets and raised them up and down in the lye and in the water we raised them up and down, and also used the hose on them.

“Q. In what form or shape or condition were the peaches?

“A. They were halves; they were freestone peaches; we also tried some whole.

“Q. Did you have any conversation with Mr. Grier at that time?

“A. Yes.

“Q. What?

“A. He told me to go in there and to look after that and to attend to that work, and to see if we could not devise some means whereby we could peel all of our peaches by the lye process or see if it could be worked out properly and we experimented on it in different ways, by using the lye in different degrees, weak and strong and so forth and different lengths of time in there and watched them to see the different conditions at different times, and in the washing of it to see how we could wash it, shake them up and down in the water, use the hose on them, and we found we could do it better by halved peaches than by the whole, that is the peach before it was halved” (R. 350).

Kennedy then goes on to say he, at that time, had heard of the use of the *Vernon* machine at Fresno and discussed the same with Grier (R., 351). On cross-examination he said:

“XQ. How did you come to know about the

Vernon machine in the peach peeling season of 1902?

"A. Well, I heard, it was in a general conversation—one way, it was through my brother, who was connected with the California Fruit Canners' Association, and through different people in the cannery business, we talked it over with; it was *general information*; I could not say exactly the number of people that told me about it, but *it was general information*" (R. 353).

It will be noted that, in 1902, the use of the Vernon machine, by the California Fruit Canners Association, at Fresno, California, was a matter of general knowledge to those interested in the cannery business. That fact alone was sufficient to start others working on *machines* for peeling peaches by the use of the lye process and it is, therefore, not surprising that Grier immediately got busy in attempting to also devise a machine for doing the same kind of work.

Regarding his conversation with Grier, Kennedy said:

"Q. Go ahead and tell us what was said by Mr. Grier in that connection?

"A. The first thing he told me was before I went down there to look into this, he and I talked it over and I heard previously that Mr. Vernon had a machine up at Fresno, and I told him while I was north shipping fruit I had a notion to go over there and see that machine, and he said, 'I had a notion to send you there, but did not,' and when I came home we talked this over and suggested to one another different ways of doing it. I remember particularly my idea of doing that

was to put it in a drum of some kind and roll it around with sprays of water upon it, something like the worm in the old grasshopper, something on that plan, and he did not think that was a good plan; he said his idea was to get them in under the spray somewhere where he could turn them over, agitate them, shake them, and we talked along about different ways, and he disposed (disclosed) the plan to me which he said he had, an idea to make a machine with a *shaker device to get these in under the sprays, shake them and turn them over, to get them on all sides*, and he thought my idea would not work, or he thought he could not get the sprays of water upon the fruit" (R. 351).

In 1903, Kennedy worked for the San Jacinto Packing Company of San Jacinto and, in 1904, for the Orange County Preserving Company at Anaheim (R., 352). Regarding the machine being used there in 1904, Kennedy said:

"A. It was a machine made by Mr. Grier; it was one of those *shaking* machines that used the grasshopper, used the caustic soda, and it was run from there on to this *shaker* machine, which ran it under the *sprays*, and washed it off, and then it went down into a tank with an elevator which run up and carried it out—I think there were three of these tanks, perhaps four—three anyhow.

"Q. In 1903, were you at any time in Mr. Grier's plant at Pasadena?

"A. Yes.

"Q. Do you know anything about whether or not he had any machines there?

"A. *He had; he had this machine of his laid (made) up, that we had been talking about.*

"Q. Can you describe the machine as you saw it down there in 1903?

"A. As near as I can remember it was the same identical machine that we had at Orange County Preserving Company in 1904.

"Q. You mean one just like it?

"A. Yes, just like it." (R. 352).

Kennedy's testimony as to Grier's conception, in the 1902 peach season, of his peach peeler, is corroborated by Mrs. Grier (R., 365-6).

J. R. LUSBY, a man sixty-five years old, testified that he was employed as bookkeeper by the Pasadena Canning Company from May 1, 1902, to September 29, 1903 (R., 275). He identified the Journal, Cash Book and Ledger of the Pasadena Canning Company and also the entries made therein while he was in the employ of that firm (R., 276-279). The said books were also identified by Grier (R., 286). The entries in said books, which are particularly relevant to the issues, have been copied into the record on pages 296 and 297.

Said entries show that, on August 1, 1902, the Pasadena Canning Company bought \$31.05 worth of caustic soda. On September 6th and 19th and on October 1, 1902, there was bought, in all, \$31.95 worth of caustic soda from the Model Grocery Company. Said purchases of caustic soda corroborate the testimony to the effect that, during the 1902 peach season, the Pasadena Canning Company was peeling peaches by the use of caustic soda, more commonly called lye.

Said entries also show that on May 29, 1903, the East Side Canning Company was charged with the sum of \$278.00 for a scalding, commonly known as a grasshopper. It will be recalled that two grasshoppers were bought in April, 1903, by Grier from the Berger & Carter Co. of San Francisco, and both were delivered to the Pasadena Canning Co. in order that Grier might install therein steam coils for heating the lye solution. One of these scalders was intended for the peach peeling machine then being built for the East Side Canning Company and, therefore, in May, 1903, we find one of said scalders charged up, on the books of that company, to the East Side Canning Company.

The entries show that, on July 30, 1903, the East Side Canning Co. was charged up with the peach apparatus sold to it by Grier's firm, and also charged for the work of installing the steam coils in the grasshopper. Regarding said entry of July 30, 1903, Grier said:

"Q. By means of that entry are you able in any manner to fix the time when that East Side Canning Company machine, lye-peeling machine and apparatus was set up there?

"A. *It was finished, it was all done when this entry was made here*" (R. 309).

Regarding the first use of said machine, after its completion prior to July 30, 1903, Taylor, of the East Side Co., said:

"Q. Mr. Taylor, when you first took this machine into your place, how was the water connected?

"A. You mean the pressure?

"Q. Yes.

"A. The pressure was very low; we tried it for two or three days and we could not use the water in the other part of the house, because it made it so weak.

"Q. You say you tried it two or three days, you mean in the actual operation of the machine?

"A. Yes.

"Q. Then what did you do?

"A. I bought a pump.

"Q. Was that pump installed in this machine, then?

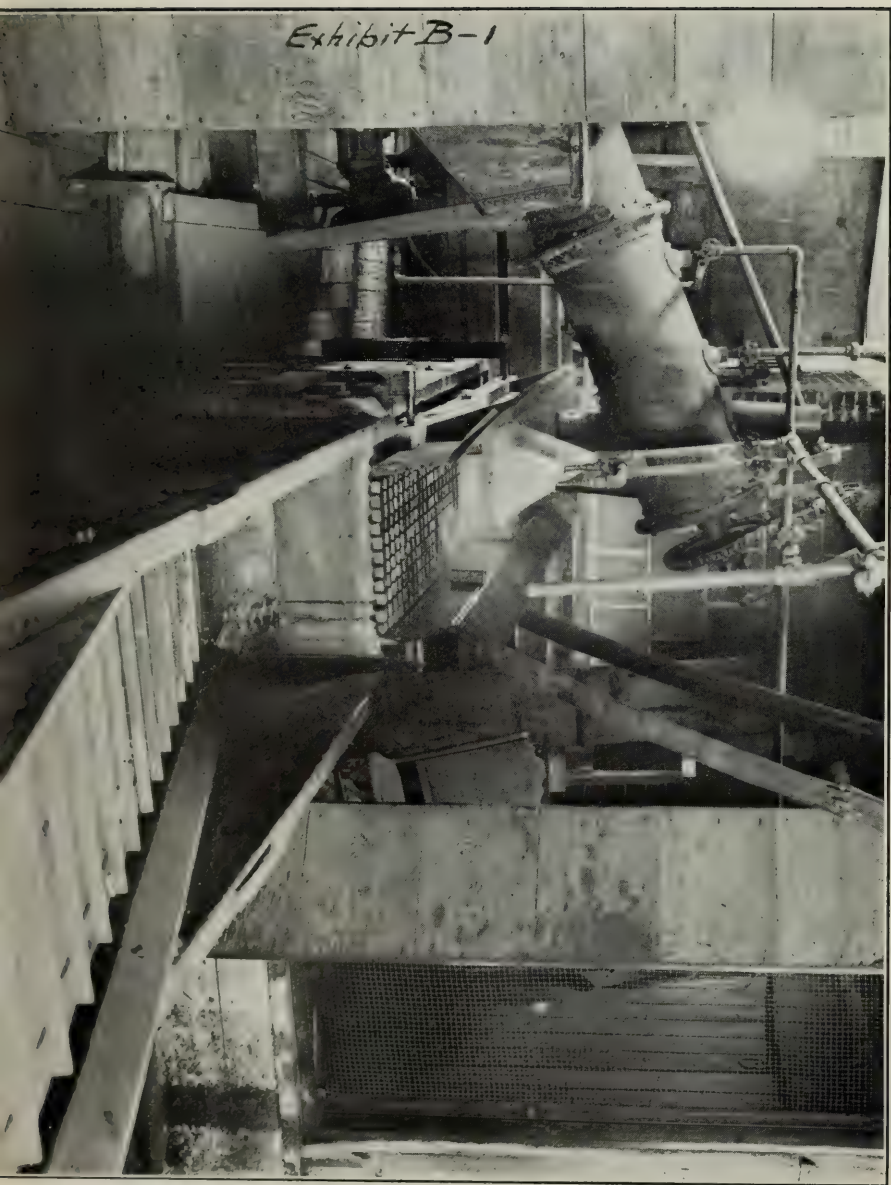
"A. It was, yes" (R. 381).

Said pump was bought from the Baker Iron Works of Los Angeles, and the *original bill* for same was offered in evidence and shows it was delivered on August 3, 1903 (R., 382). A copy of said bill appears at page 904 of the record. Said pump is shown in the photograph of the said East Side Canning Company's machine offered in evidence. On the opposite page appears a reproduction of said photograph.

The books of the Pasadena Canning Company also show the extensive purchases by it of caustic soda during the 1903 peach season.

W. H. FINLEY testified he entered the employ of the Pasadena Canning Company on April 6, 1903, and that the particular purpose, for which he was employed, was to build the line of tanks for the peach

Exhibit B-1



peeling machines. However, by reason of a delay in getting the lumber therefor, he did not commence actual work on the tanks for a week or ten days after April 6th. Later on, he was entrusted with the remainder of the work on the machines, which were completed in July, 1903 (R., 237-239).

Finley described, in detail, the two machines built by him and the operation, in 1903, of the one installed at the Pasadena Canning Company's plant.

Regarding the pump bought by the East Side Company in August, 1903, from the Baker Iron Works, Finley said:

"Q. Do you know anything about the pressure of the water at the East Side cannery in Los Angeles in 1903, when they first started that machine?

"A. Yes, it was weak.

"Q. Do you know whether anything was done in that regard?

"A. Mr. Taylor ordered a pump.

"Q. What was the purpose of such pump?

"A. For the same purpose, to make the pressure sufficient to wash the disintegrated peel from the peach.

"Q. Did you see that pump in place afterwards?

"A. Yes, I helped install it.

"Q. Is that the pump that is shown in one of these photographs?

"A. Yes, I recognized that while I was looking through it a while ago.

"Q. That is the photograph B-8s?

"A. Yes.

"Q. Did you ever afterwards build any more of these machines?

"A. Yes, I helped to build two more and a shaker" (R. 247).

The actual shaker mechanism, pipes and Gem nozzles, forming a part of the East Side Company's machine, completed in July, 1903, were identified by Finley and offered in evidence as "Defendant's Exhibit K" (R., 270).

The bookkeeper, J. R. LUSBY, also testified to the fact of Finley's employment, in 1903, to build the peach peeling machines, which he described (R., 294-5). Regarding its use, Lusby said:

"MR. CHAPPELL—Q. When did the machine go into full operation that year—when did the peach season begin in which the machine was used?

"THE COURT—Which year are you speaking of now?

"MR. CHAPPELL—Q. 1903.

"A. Just the exact date I could not give you; along in July, middle or latter part of July" (R. 299).

MRS. ALMA GRIER also described the Grier machine and stated it was used at the Pasadena Canning Company in 1903 and thereafter during every season up to 1914 (R., 367).

G. C. WATERHOUSE, manager of a school for boys, and son of ex-Mayor Waterhouse, of Pasadena, testified he worked in the Pasadena Canning Company plant during the years 1902, 1903 and 1904. He fully

described the Grier machine and stated he saw it in use during the 1903 peach season (R., 373-5).

F. F. STETSON, a Southern California canner, also described the Grier machine and said he saw it in use at the East Side Canning Company's plant during the 1903 season (R., 389).

FRANK H. SANBORN, a retired business man of Los Angeles, testified as follows:

"Q. Now for whom did you work in 1901, 1902 and 1903?

"A. Mr. Stetson.

"Q. Were you in Mr. Taylor's Cannery (East Side Canning Co.) during any of those years?

"A. Yes, a great deal.

"Q. What process of peeling peaches did Mr. Taylor use during those years?

"A. In 1901, 2 and 3, he used a lye process of peeling peaches.

"Q. Tell us what that process consisted of and how it was worked at that time?

"A. In Mr. Taylor's cannery?

"Q. Yes.

"A. They had tanks, wooden tanks—

"THE COURT—Q. That was 1901, 2 and 3, you say?

"A. Yes. The peaches were dipped into a tank and scalded and then into another tank and washed and so on until they were through several tanks.

"MR. LYON—Q. At any time was that process changed?

"A. In 1903.

"Q. What was the change made at that time?

"A. In 1903 they put in a machine and that scalded the peaches and it went from that into a

line of tanks or a line of tanks and carriers they were washed.

"Q. After leaving the scalding tank do you remember what was the first part of the machine after that?

"A. Leaving the scalding tank they went on to a washing arrangement with sprays.

"Q. Just describe that washing arrangement and the location of the sprays and how it operated at that time?

"A. Coming from the scalding it went on to a platform, a cradle arrangement.

"THE COURT—Q. Did it look anything like that thing over there?

"A. Yes, that is the style of arrangement it went on.

"THE COURT—*That is enough; there is no use piling up evidence and getting a repetition of the matter.*

"MR. LYON—That is all, Mr. Sanborn.

"MR. CHAPPELL—*No cross-examination*" (R. 392).

On other occasions, the lower Court also stopped defendant from putting in further proofs regarding the Grier invention. The said proofs were so overwhelming that, as the lower Court said, there was no need of further *piling up the evidence*. Opposing counsel also tacitly admitted such to be the situation and refrained from cross-examination. As heretofore stated, plaintiff's counsel, in the lower Court, did not seriously question said Grier proofs. They amount to a demonstration.

W. F. HERMAN testified he was employed by Grier's

company in 1902 and 1903 and, in May, 1903, saw Finley there working on the tanks. He described the Grier machine and stated it went into operation at the beginning of the 1903 peach season, which commenced in July (R., 354-360).

MARY E. MAYES began working for Grier's company in 1902 and thereafter worked for it a number of seasons. She refers to the 1902 use of the lye process and the removal of the disintegrated skin by hosing it off. In 1903, she saw the use of Grier's machine, which she described. On September 6, 1904, she went to the World's Fair at St. Louis (R., 385-388).

In his brief, filed in the lower Court, Mr. Chappell states:

"But it is believed that there must have been, in view of the identity of the structures, some inter-communication between Beekhuis and Grier, but as it is not material, because both are subsequent to Dunkley, it has not been attempted to go into the matter."

In 1903, H. A. Beekhuis was the superintendent of the Hanford, California, plant of the California Fruit Cannery Association. There is no pretense that he built any peach peeling machine before 1904 (R., 473). It is to be noted that his patent, issued on September 3, 1907, upon his application filed on May 25, 1904, was in interference with the Dunkley application. Possibly Mr. Chappell's suggestion, of some

intercommunication between Beekhuis and Grier, is based on some information received by him from Mr. R. I. Bentley or from some other official of the California Fruit Canners Association. It will be recalled that on May 22, 1914, the Dunkley Company gave the California Fruit Canners Association a *free* license under the patent in suit and, in reference to such circumstance, Mr. Bentley said:

“A. The only talk that I had with Mr. Dunkley was this: that if he gave us a *free* license, naturally our interest lay with him, and *we would do what we consistently could*.

“Q. Then you considered and do consider that the interests of the California Fruit Canners Association are with the Dunkley Company at the present time in this litigation?

“A. Yes” (R. 226).

The reason for the granting of said *free* license will be hereafter commented on in connection with our discussion of the Vernon machine.

However, even though Mr. Chappell's suggestion may be based on information from such source, we believe the record herein confirms the correctness of such suggestion. The introduction in evidence of the letters, about to be referred to, was objected to on the ground that the same were immaterial and the objection was sustained and excepted to. In our opinion said letters are so obviously material for many reasons that we shall refrain from arguing the question of their materiality. They speak for themselves.

On August 4, 1903, M. J. Fontana, an officer of the California Fruit Cannery Association, wrote to E. H. Kennedy, Superintendent of the Los Angeles plant of such Association, as follows:

"Aug. 4, 1903.

"My dear Mr. Kennedy:

"I intended to look how Grier & Waters are peeling their peaches but did not get the time. I therefore wish you would in some way or other find out what system they use. This ought to be attended to at once by some intelligent person and promptly reported to head office. A prompt attention to above will be appreciated.

"Yours truly,

"M. J. FONTANA" (R. 397).

This letter certainly shows that the California Fruit Cannery Association had, in some way, found out that Grier was using some new method or machine for peeling peaches and was most anxious to find out just what it was. On August 5, 1903, Kennedy replied:

"Aug. 5th, 1903.

"California Fruit Cannery Association,

"San Francisco, California.

GENERAL SUPERINTENDENT.

"Gentlemen:—

"Replying to your favor of the 4th regarding system of peeling peaches employed by Grier & Waters, the writer was at Pomona a few days ago and was through Mr. Waters Cannery and we did not notice anything new in this line; he has a crude arrangement of dipping his peaches in a solution of soda but it is the same as it was five years ago, they use it very little if any and only then on pie

fruit, in fact we do not think he has used it since Grier left there, but peels all his fruit by hand with the Pomona peeling knife.

"Grier works part of his fruit with the soda system, and *has an arrangement of putting the fruit under hydraulic pressure of water after it has been treated by the soda, or in other words he has the water under about 70 pounds pressure and directs this against the fruit to remove all effects of the soda as well as peeling dirt, etc.*, and last season they turned out some very nice goods with it; have not heard what they are accomplishing with it this season and they only commenced work on peaches two days ago *and do not know if they have used it or not this season.*

"Very truly yours,

"CALIFORNIA FRUIT CANNERS ASSOCIATION,

"Per E. H. Kennedy" (R. 399).

It will be noted Kennedy states he does not know what Grier was using at the time of writing the letter, to wit: August 5, 1903. In view of Kennedy's inability to give the desired information and in view of the importance placed on the securing of it by Fontana, *it is naturally to be presumed that the California Fruit Canners Association made further inquiries and ascertained that Grier was then using, in August, 1903, his new machine embodying said shaker device.* Having secured such information, it is, of course, most probable that the Association passed it along to Beekhuis, one of its superintendents. We believe, therefore, that Mr. Chappell is correct in his said suggestion; especially in view of the fact that he has other sources of information not open to us.

The testimony of Grier, of Mrs. Grier and of Clarence L. Kennedy, in reference to Grier's conception and disclosure, during the peach season of 1902, is consistent with all the surrounding circumstances and is consistent with the ordinary laws governing human conduct.

Grier could only carry on his experiments during a peach season and it is natural that he conceived the invention while carrying on and as a culmination of such experiments. The actual building of his peach peeling machine began in April, 1903, so he must have conceived the ideas embodied therein before that date. In view of the foregoing, it would be most remarkable if he did not conceive the invention during the 1902 peach season, commencing the latter part of July and running through August and September. Therefore, there can be no reason to doubt that said witnesses were correct in fixing Grier's date of conception and disclosure during the 1902 peach season. Kennedy's letter to the California Fruit Canners Association fully corroborates the testimony to the effect that, during the 1902 peach season, Grier was using peeling jets or spray to remove the disintegrated skin after its subjection to the lye-solution. Furthermore, said letter shows that, on August 5, 1903, and necessarily before that date, Kennedy knew of the use of peeling jets or spray, *under a seventy pound pressure*, as a means for the removal of the disintegrated skin. Hereafter, we shall show that, *at that very time*, Kennedy

was using one of the Vernon machines embodying peeling jets or spray and rotating brushes for the removal of the disintegrated skin.

There being no use for a peach peeling machine except during a peach season, it is evident that Grier, after conceiving his invention during the 1902 peach season, was most diligent in reducing to practice such invention because, as early as April, 1903, he had started to build two of said machines and had them ready for use before the next season to wit, the 1903 peach season.

We call attention to the full and complete proofs pertaining to the history of the Grier invention. Said proofs are of the nature and character of those held, in all of the decisions, as sufficient to prove an anticipation of a patent. Said proofs stand unimpeached and were not even seriously questioned in the lower Court. The same not only comprise the oral testimony of a large number of reputable witnesses in a position to know the facts; but also embrace the vital part of the actual machine relied on; photographs of the remaining parts, which are still in existence, but of too bulky a nature to offer in evidence; the original books of entry showing the transactions pertaining to the building of and use of said anticipating machines; and original documents showing the purchase of parts of said machines. Furthermore, the oral testimony shows from whom, in California, various parts of said machines were purchased, thus

affording ample opportunity to the opposing party to check up the accuracy of said testimony.

The respective dates pertaining to the respective activities of Grier and Dunkley in connection with their respective inventions are as follows:

	Grier.	Dunkley.
Conception	August-Sept. 1902	August, 1903.
Disclosure	" " "	" "
Model	—————	October, 1903.
Reduction to Practice	July, 1903	August, 1904.

It will be noted that Grier was the first to conceive and also the first to reduce to practice. Therefore, under all the authorities, he must be held to be the first inventor. Even if Dunkley be accorded August, 1902, as his date of conception, nevertheless, Grier would still be the first inventor, as Dunkley was not diligent in reducing the invention to practice, he having allowed two peach seasons to go by without making a commercial machine.

Furthermore, the burden was on plaintiff, to prove, *beyond a reasonable doubt*, that Dunkley made his invention prior to the *public use* of the Grier machine in July, 1903. Of course, the proofs show, *beyond a reasonable doubt*, that Dunkley's first consideration of the invention was in August, 1903, when he discussed the matter with Bruner after the commencement of the Michigan 1903 peach season.

In view of the fact that Grier was the first in-

ventor and that plaintiff failed to prove Dunkley's *date of invention* was prior to the public use of the Grier machine in July, 1903, the Dunkley patent is invalid.

VI.

PRIOR USE OF VERNON MACHINE.

It is admitted that, during the months of July, August and September, 1902, at the Fresno, California, plant of the California Fruit Cannery Association, the so-called Vernon machine was publicly and commercially used. It is also admitted that three additional Vernon machines, each of a larger capacity than the 1902 machine, were built and installed prior to the 1903 peach season. During such 1903 peach season, said machines were commercially used by the said Association in its various plants.

It is admitted that the 1902 Vernon machine embraced the line of apparatus disclosed in the Vernon *process* patent No. 784,527 issued on March 7, 1905, upon Vernon's application filed on November 22, 1902. The patentee, C. J. Vernon, was killed on December 20, 1902, in a railroad wreck (R., 125). During the 1902 peach season, he was superintendent of the Fresno plant of the California Fruit Cannery Association. A copy of the Vernon patent appears at pages 742 to 744, inclusive, of the record herein. It is to be noted that said patent is for a "*Process* of

Peeling Fruit," the patentee, Vernon, *evidently believing there was nothing new or patentable in the several devices included in the line of apparatus used in practicing the process*. Therefore, the apparatus referred to therein as being adapted for use in carrying out the process is not fully described in the specification or plainly or accurately shown in the drawings. Said apparatus is referred to as merely "one form of apparatus capable of employment in carrying out" the process. The patent being for a *process*, Vernon's patent solicitors evidently thought it sufficient to merely indicate the type of apparatus that could be used without giving the details of construction of such apparatus. Beginning at line 40, page 1, of the patent, it is stated:

"This process or method relates to the removal of the outer covering or peel from fruit or other articles and it consists, essentially, in cutting and pitting the fruit, conveying the same within a closed heated receptacle, progressing the fruit through a solution of caustic soda in said receptacle, then discharging the fruit into a solution containing alum, then immersing the treated fruit into cold water, thence discharging the fruit upon a brushing machine, thence into cold water, from which the fruit emerges in condition for transportation to the place of deposit or otherwise."

Beginning at line 1, page 2, of the patent, it is said:

". . . provided with an endless conveyor or belt 16, constructed to discharge the fruit upon a

brushing machine 17, where any particles of the outer covering or peel are removed from the fruit and from which the thoroughly peeled fruit is discharged, etc.”

It will be noted that the so-called “*brushing machine*” is not described and the same is merely indicated in the drawings without any attempt to show the details thereof. However, it is stated that the fruit is “*thoroughly peeled*” on leaving such brushing machine.

On the opposite page, are reproduced the Vernon patent drawings, which indicate, in a general way, the several devices making up the line of apparatus which may be used in carrying out the process. The lye or caustic soda tank, shown in the drawings, is of the type known as a “grasshopper” and is so referred to in the testimony.

It is admitted that the “*brushing machine*,” forming a part of the Vernon line of apparatus, as actually used in 1902, was, in fact, an adaptation of the Baker, et al. “Fruit Cleaner, Brusher and *Washer*” disclosed in United States letters patent No. 616,284 issued on December 20, 1898. A copy of said patent, Defendant’s Exhibit F, appears at pages 883 to 886, inclusive, of the record herein. In his brief, filed in the lower Court, Mr. Chappell said:

“The Vernon machine made use of the Baker-Chalker orange polisher for washing. A quantity of water was delivered on to the brushes and the fruit, which was rubbed by the brushes, etc.”

No. 784,527.

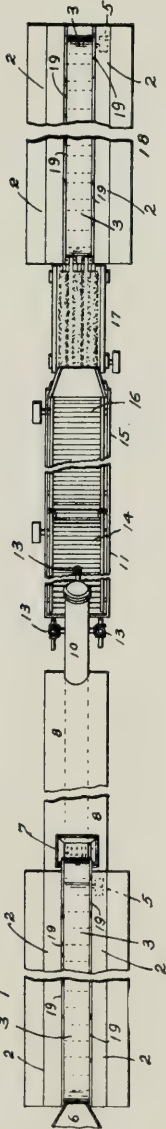
PATENTED MAR. 7, 1905

C. J. VERNON.

PROCESS OF PEELING FRUIT.

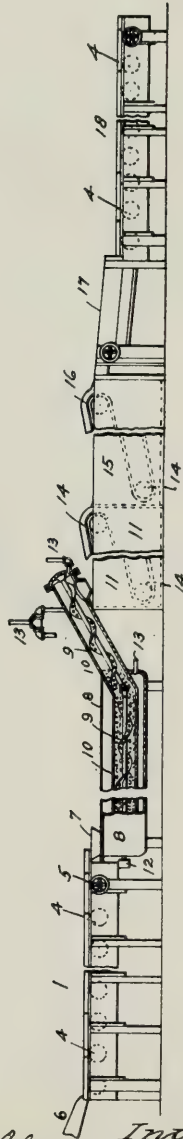
APPLICATION FILED NOV. 22, 1902.

Fig. 1



Witnesses
My G. Cates.
L. B. Alderete

Fig. 2



Inventor
Charles J. Vernon
By
Charles S. Rogers
his Attorney

No. 616,284.

Patented Dec. 20, 1898.

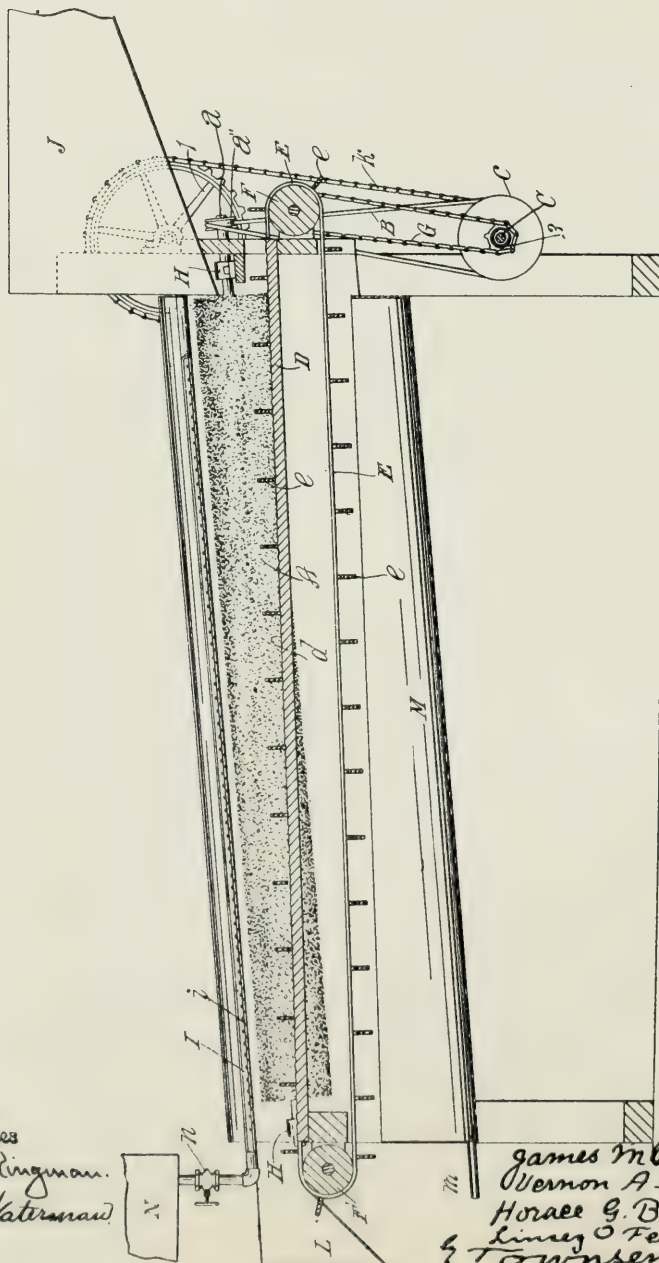
J. M. BAKER, V. A. CHALKER, H. G. BAKER & L. O. FERGUSON.

FRUIT CLEANER, BRUSHER, AND WASHER.

(Application filed Jan. 20, 1898.)

(No Model.)

2 Sheets—Sheet 1.



Witnesses
Terry Klingman.
Edw. Waterman

Inventors
James M. Baker
Vernon A. Chalker
Horace G. Baker
Linley O. Ferguson
& Townsend Bros
attorneys

On the opposite page is reproduced sheet 1 of the Baker, et al. patent. The drawing, "Figure 1 is a longitudinal vertical mid-section" of the Baker machine. In the drawing, one rotating brush A, the endless belt or carrier E and the *perforated water-pipe* I are shown. As said drawing is a vertical mid-section view, the other rotating brush on the *near* side of the endless belt E is not shown, but it is of course to be understood that, in said machine, the fruit was carried along on the endless belt E between *two* rotating brushes and beneath the perforated water-pipe located directly above the endless belt.

Regarding the water-pipe I, it is said, beginning at line 25, page 2 of the Baker et al. patent:

"I indicates a water-pipe provided with perforations i, arranged in three rows, one row along the bottom and a row along each side of the bottom row, so as to direct the water downward on to the fruit and sidewise on to the brushes while the same are in operation for washing fruit."

For the moment leaving out of consideration the "peeling jets" or *spray* referred to in the Dunkley patent, it will be seen that the Vernon machine, as actually used more than two years prior to the Dunkley application date, *admittedly embodied each and every element of all the respective combinations of elements respectively covered by the Dunkley claims in issue*. Furthermore, it is admitted that, in the operation of said Vernon machine in 1902, water was

conveyed to the perforated pipe and issued from the perforations thereof.

In the lower Court, opposing counsel, so far as we were able to understand their argument, urged only two grounds why the Vernon machine should not be adjudged a complete anticipation of the Dunkley patent. These grounds were:

1st. That in the structure, *shown in the Baker-Chalker fruit washer patent*, the carrier-belt moves at a speed slower than the speed at which the rotary brushes move.

2nd. That the 1902 water pressure at Fresno was insufficient to cause the water to issue from the perforated pipe in the form of peeling jets or spray.

Upon said two grounds, opposing counsel based their contention that, in the operation of the Vernon machine, the brushes only did the peeling.

Before considering said contention, it is necessary to first consider what is disclosed in the Dunkley patent. Whether or not the Vernon machine anticipates depends upon its substantial identity with the machine *disclosed and as disclosed in said Dunkley patent*.

There is not a word said in the Dunkley patent in reference to the speed at which the carrier belt should run or what its speed is relative to the speed at which the rotary brushes run, or at what speed the rotary brushes run. Anyone, attempting to practice the invention disclosed in the Dunkley patent, would neces-

sarily be compelled to use his own judgment as to the proper speed at which to run the fruit through the machine.

Furthermore, there is not a word said in the Dunkley patent as to the amount of water pressure required in the operation of the machine. The amount of said pressure is likewise left to the judgment of the one attempting to build and operate a machine in accordance with the said patent.

The foregoing shows that opposing counsel are attempting to differentiate the Vernon machine from the Dunkley machine, as disclosed in the Dunkley patent, *in respect to details not disclosed in said patent.* However, the record conclusively shows that the Vernon machine peeled peaches by the use of peeling jets or spray and not by the action of the brushes alone.

In his opening statement, in the lower Court, Mr. Chappell said:

"The patent (Dunkley) indicates that the brush acts somewhat on the peach in abraiding the surface, but the principal work is done by the sprays, and the sprays are particularly claimed as instrumentalities in the claims involved herein, and they are the principal instrumentalities we can show, because the machine will not peel a peach if forsooth the sprays of water are cut off; if the machine is then run, although the peach has been soaked, it will not be peeled; the peach passes too rapidly for one thing for the brushes to act upon it; but if it was run slowly the brush would sim-

ply move the peel to another place on the surface, and it would not be gotten rid of; it needs the active agency of a spray of water striking against the peach to dash the disintegrated peel from the surface of it. It is also particularly necessary that the spray act upon the peach because of the irregularities in the surface of the peach, the brush would not reach the cavity around the stem, or the irregularities on the crease of the peach, all of which are reached positively by the spray" (R. 56).

Mr. Chappell is absolutely correct when he says that the brushes *alone*, in one of these brush peach peeling machines, will not remove the disintegrated skin. That fact must be apparent, when one considers the nature of such skin. As said by Melville Dunkley in reference to the chemical action of the caustic soda solution on the skin:

"THE COURT—Q. It reduces it to a glutinous mass or paste?

"A. Yes" (R. 82).

As said by Mr. Chappell, whether the peach goes through the machine *rapidly* or *slowly* is immaterial; in neither case, will the brush alone remove the skin; as said by him: "*but if it was run slowly the brush would simply move the peel to another place on the surface, and it would not be gotten rid of*" (R., 56).

In making said statement, Mr. Chappell was referring to *whole* peaches (R., 55). Of course, his statement applies *with all the greater force to half-*

peaches such as were operated on in the Vernon machine, it being obvious that the brushes could not possibly operate as efficiently on half-peaches as they could on whole peaches, and, therefore, *could not possibly exert any material peeling action or effect*. The round form and more regular contour of the whole peach makes it quite possible for the brushes to rapidly and uniformly rotate it, thus bringing every portion of the surface thereof in contact with the brushes, with the possible exception of the stem cavity. As said by Melville Dunkley, “. . . *the peach is spun in all directions*” (R., 64). Even so, Mr. Chappell says, the brushes will merely move the slimy, paste-like disintegrated skin from one place on the surface to another, without removing it. The peeling action of the brushes on *half-peaches*, by reason of their irregular shape and not being round and adapted to spin and turn around uniformly, would necessarily be even less effective than on whole peaches; in other words, it would be nil. Even if the brushes could remove the skin by contacting with the surface of the *whole* peach, there would be, in the case of *half-peaches*, no chance of much of the surface thereof coming in contact with the brushes. *It necessarily would be a hit and miss action as distinguished from the certain and uniform action of the brushes on the spinning, round whole peach.*

Regarding the operation of the Dunkley machine,

in the absence of peeling jets of water, Melville Dunkley said:

"THE COURT—Q. Without the action of the water jets the peaches would not deliver in a *merchandise* state?"

"A. No.

"MR. WHITE—Q. As I understand you, that machine, without the operation of these sprays, would be a worthless proposition and could not be used commercially, is that correct?"

"A. *I think that is very correct, yes*" (R. 83).

The foregoing very conclusively demonstrates that no peach peeling machine, relying on the action of brushes alone for the removal of the disintegrated skin, *could be used commercially or turn out a merchandise product*. Such a machine, for any practicable purpose, is worthless and no business man would tolerate its use for a moment in preparing peaches for market. The use of it would simply ruin the peaches run through it; as said by Melville Dunkley, from such a machine "*the peaches would not deliver in a merchandise state.*"

In regards to adapting in July, 1902, the fruit washing mechanism of the Baker-Chalker patent, for use in the Vernon machine, Mr. H. G. Baker, one of the patentees named in the Baker-Chalker et al. patent and formerly connected with the H. K. Miller Manufacturing Co., which made and sold the mechanism to the California Fruit Cannery Association, said:

"Q. Now, you say you were called up there to see if you could give this machine more capacity. Please explain what you meant by that and what, if anything, you did?

"A. The capacity simply meant that they could get more fruit through the machine in a given time; what I did to accomplish that end was two or three different things. Do you wish me to tell what those things were?

"Q. Yes.

"A. This belt conveyor could be adjusted up or down as regards axis of the brushes, *and by raising that belt conveyor it brought the fruit so high on the brushes that they did not act so much upon the fruit*, and therefore would not retard the progress of the fruit through the machine so much and more fruit would go through on that account; *by putting the brushes a little wider apart more fruit would pass through because they would act less upon it.*

"Q. Now, in that washer that was so installed—

"A. Then one other thing we did, when that machine was sent up there from the shop the brushes both rotated inwards on the conveyor, or the brushes rotated in opposite directions, both inward and downward on the conveyor, and I shifted one of the axis on the front end of the machine so that they both revolved in the same direction, *and that also turned the fruit and let it go through much faster*" (R. 106).

The foregoing changes, made at Fresno in July, 1902 (R., 110), in the fruit washer mechanism, show that it was fully appreciated the peaches could be rapidly carried through the machine. Said changes also clearly show that the brushing action of the rotary brushes was not alone relied on to remove the

disintegrated skin. Said changes were expressly made for the purpose of minimizing the brush action and limiting it practically to a mere turning of the fruit. As said by Mr. Chappell, said brushing action alone would not remove such skin *in any event* and therefore, it was impossible to rely on it to perform that function. Therefore, in making said changes, Baker so adjusted the parts of the machine that the action of the brushes was primarily merely to turn the fruit. The changes made, to increase the pressure of the water used with the machine, also clearly show that Vernon, and those working with him, fully understood that it was principally the water, and not the brushes, that removed the skin. Baker intentionally minimized the brush action and Vernon intentionally increased the water jet effect.

After referring to the changes made early in July, 1902, by Baker in the machine, R. B. Way, said:

“MR. CHAPPELL—Q. To what extent did the brushes act on the peach or peaches as they passed through the machine; were you able to see any brush mark of any kind?

“A. *Not after we raised the conveyors up*; I don't remember that we ever saw any brush marks on them” (R. 138).

It will be noted that opposing counsel ignore the changes made by Baker in the washer mechanism for the purpose of adapting it for use in the Vernon peach

peeling machine. They base their contentions on the Baker-Chalker patent alone.

That there was *plenty of water directed on to the half peaches*, while passing between the rotary brushes in the Vernon machine, is admitted by Mr. Chappell, who, in his brief filed in the lower Court, said:

“Further than that, it conclusively appears that while *there was a considerable volume of water delivered on the peaches*, the same was not delivered by any jet action, but simply dropped down *in a flood* upon the peaches and on the brushes for a general *flooding* of same, as distinguished from any *spray* action, the object being to permit the brushes to do their work and *a flood of water* to carry away any disintegrated peel or accumulations that have been displaced by the action of the brushes.”

The imaginary mode of operation, described by Mr. Chappell, is not consistent with any of the testimony; yet Mr. Chappell's said description of the Vernon machine's mode of operation was apparently adopted by the lower Court in its opinion herein (R., 697). Admittedly, said “*considerable volume of water*,” said “*flood of water*” came out of the perforations in the pipe in the Vernon machine. The only form in which it could so issue from said perforations or holes, would be in the form of *spray* or *jets*. The record herein shows and opposing counsel, Mr. Miller, at the oral argument, admitted that the natural water pressure in Fresno was 35 to 37 pounds. He said, “. . . we

"have simply to remember that the pressure there at Fresno from these artesian wells feeding and supplying water to a tank, that is, the water pressure down there at Fresno is not more than about 35 pounds —from 35 to 37 pounds . . ." (R., 686). Said pressure is, of course, the natural pressure, in the absence of the use of any pump for increasing it. The Dunkleys do not even pretend they ever used a pressure exceeding 40 pounds at any time prior to the filing of the Dunkley application, which was after the 1904 peach season. Furthermore, the Dunkley patent does not contain a single word as to the amount of pressure to be used or required and it is to be remembered that the expression "peeling jets" is not found in the Dunkley application as filed.

In regards to the pressure of the water used in connection with the Dunkley machine, Melville Dunkley said:

"A. We have used pressure of from perhaps 40 to 125 pounds.

"Q. And when you increased from 40 pounds to 125 pounds were you enabled, by reason of such change, to use a caustic soda solution of less strength?

"A. The pressure which gives you the best results in the use of all of the work of this output, that is, that allows you to use the minimum of caustic soda and the minimum of water consumption from our experience has proven to be around 70 to 75 pounds.

"THE COURT—What counsel is asking you is this: *Does the greater pressure enable you to*

use a weaker solution in the disintegrating process?

"A. The pressure from 40 pounds, raised to 70, will allow you to do that, and will save the use of caustic soda; I do not believe that the raise from 70 pounds up will be of much benefit" (R. 91).

Without the use of any pump in the line, the pressure of the water used in the Vernon machine was admittedly only 3 to 5 pounds less than the maximum pressure used by the Dunkleys at any time prior to the filing of the Dunkley application. *Of course, no particular pressure is mentioned in the Dunkley patent.* If it requires invention to determine what pressure should be used, the Dunkley patent is void for failure to disclose how the invention, covered thereby, can be practiced. *If it does not require invention to determine the right pressure to use,* then there was no invention on Dunkley's part in view of the prior use of water under 37 pounds pressure in the Vernon machine. Even before the installation of the pump, in connection with the water supply for the Vernon machine, about the first of August, 1902, there could have been little difference in the effect produced by Vernon's jets of water under 35 to 37 pounds pressure and Dunkley's jets under 40 pounds pressure. In each case, the jets of water played on the peaches, and, therefore, must have produced substantially the same results. *Furthermore, the peeling effect of the jets depends upon two factors, to wit: strength of lye solution and pressure of water.* In the Dunkley patent

no specific data is given in regards to either of said factors. Said matters are left to one's judgment.

Regarding the installation of the pump to increase the water pressure, defendant's witness, Way, said:

"XQ. When was the pump put into the line that you referred to?

"A. My opinion now is that it was put in about the first of August, or directly after—just about the time the bulk of the peaches began to come in.

"XQ. Was the pump taken out at the time you left there?

"A. No, not to my knowledge, it was not; I don't know.

* * *

"XQ. *Are you sure that the pump was put into the line that led to the spray pipe?*

"A. Yes.

"XQ. What makes you so sure of that?

"A. Because that was our main trouble with the water.

"XQ. That is, you could not get enough water?

"A. We could not get enough water, yes" (R., 141).

The foregoing certainly shows that the operators of the Vernon machine in 1902 were relying on the pressure of the jets to peel the peaches. Otherwise, why was the brush action reduced to a minimum and the jet action increased by the installation of a pump? Furthermore, when the pressure was increased by the installation of the pump, it is quite obvious that the jets necessarily peeled or removed the disintegrated skin. The jets admittedly played on the peaches and,

under such a pressure, could not do otherwise than remove the disintegrated skin. *Jets, under the same pressure, behave the same in California as in Michigan.* The Court of Appeals for the District of Columbia recognized said fact in comparing the Dunkley and Beekhuis machines. It said:

“The skin of the peach having been disintegrated by the action of the hot solution of lye, that is to say, cut or broken and loosened from the pulp, was, to say the least, *as easily removed by one jet as another.*”

Plaintiff's own witness, Fontana, says that when he went to the Fresno plant in 1904, he found the said pump.

“Q. Did you find any pump there when you went there?

“A. Yes.

“THE COURT—Q. *Attached to the line?*

“A. Attached to the line, yes” (R., 473).

We have heretofore referred to the fact that the California Fruit Cannery Association was granted a *free* license by the Dunkley Company on May 22, 1914. A copy of said license appears at page 223 of the record. Mr. Robert I. Bentley, General Manager of said Association, was called at a witness by defendant to develop the facts pertaining to said *free* license and the consideration therefor. Mr. Bentley said:

“Q. In consideration of this license which you

have just produced, did the California Fruit Canners Association agree to refrain from giving information in regard to the prior use of such machine and processing by the California Fruit Canners Association in 1902 and 1903?

"A. No.

"Q. Was there no talk about that?

"A. We did not agree to do anything other than embodies in the agreement.

"Q. Was there any understanding, gentlemen's agreement or talk about that in any manner?

"A. The only talk that I had with Mr. Dunkley was this: that if he gave us a free license, naturally *our interests lay with him and we would do what we consistently could.*

"Q. Then you considered and do consider that the interests of the California Fruit Canners Association are with the Dunkley Company at the present time in this litigation?

"A. Yes." (R., 226.) * * *

"MR. LYON—Q. Your Association, the California Fruit Canners Association, in January of this year, received a request from Mr. E. H. Kennedy of Los Angeles and Lankershim, for leave to inspect your Los Angeles plant in regard to certain measurements of machines and so forth, did it not?

"MR. MILLER—We object to that as immaterial and incompetent, something occurring after the commencement of this suit, in fact only a very few months ago, last January.

"THE COURT—What is the purpose of this?

"MR. LYON—I want to show in connection with the statements of the witness that they have considered their interests were with the plaintiff in this case, they have refused all information in this connection and have refused access to their records and that they wrote letters to us to that effect, that

they could give us no information or assistance whatever, and they would give none.

"THE COURT—I do not see the materiality of that; he is not a party.

"MR. LYON—It is to excuse absolutely the non-production of the officers of the California Fruit Canners Association, and to show that inasmuch as their interest is with that of the plaintiff in this case, if the plaintiff wants the evidence of these parties in this case, it is their duty to produce them.

"THE COURT—How is that?

"MR. LYON—Simply to explain the reasons why we do not call the officers of the California Fruit Canners Association in regard to this Vernon use, showing that they are hostile to us.

"THE COURT—*That does not excuse anything*; you cannot assume because one's interest was a certain way that he is going to come here and falsify; that is no presumption that follows, whatsoever; it is a consideration that the Court may take into its mind in determining whether a witness is stating the truth, that his interests are a certain way, but you cannot presume a man is going to tell a falsehood because it is against his interest. I have an idea what you want to get at, but you are not taking the proper way. Of course, I cannot advise you" (R. 227).

The lower Court's view, in respect to the foregoing situation, is quite different from that taken by the United States Supreme Court in respect to a similar situation arising in a patent suit in which the patent was held invalid by reason of one, other than the patentee, being the first inventor. In that suit, *Coffin v. Ogden*, 85 U. S., 120, the bill was dismissed

by the lower Court, the complainant appealed and the Supreme Court, in affirming the lower Court's decision, said:

"The appellants called no witnesses at Pittsburg or elsewhere to contradict or impeach those for the appellees. Brossi was subjected to a vigorous cross-examination, but, in our judgment, it in nowise diminishes the effect of his testimony in chief. The counsel for the appellants asked with emphasis, in the argument here, why the defendants had not called Jones, of the firm of Jones, Wallingford & Co.? The question was well retorted, why was he not called by the other side? He does not appear in a favorable light. He prevented Erbe, who was in his employ, from going to New York to testify in behalf of the defendants, and avowed a determination to prevent, if it were possible, their obtaining the testimony of Brossi, Masta and Patterson. It is difficult not to regard him with a feeling akin to that which attends the presumptions *in odium spoliatoris*. We entertain no doubt that the testimony of all these witnesses is true in every particular, including the statement of Brossi as to putting the lock on the door. *If that were false, doubtless Jones would have been called to gainsay it. His hostility to the defendants is a sufficient reason for their not calling him for any purpose.*"

As stated before, Mr. Bentley was called by the defendant for the sole purpose of explaining the extraordinary situation embracing the granting of an absolutely *free* license by the plaintiff herein to the California Fruit Cannery Association in consideration of that Association doing "*what it consistently could.*"

Defendant's counsel did not question Mr. Bentley regarding the construction and use of the Vernon machine because he was a hostile witness. However, plaintiff's counsel did not call him as a witness, and, when he was on the witness stand as defendant's witness, they carefully refrained from questioning him regarding such Vernon machine. Why? If the testimony of defendant's numerous witnesses regarding the Vernon machine were false, why did plaintiff's counsel refrain from having Mr. Robert I. Bentley deny the truth of said testimony? Mr. Bentley is a very prominent citizen in this community. He is widely known, bears an enviable reputation and his testimony, in any matter, would necessarily have great weight with any Court. He, of all others, would have proved the most valuable witness for plaintiff, that is: provided the testimony of defendant's witnesses had been false. However, it was not false, and, therefore, Mr. Bentley was not available to plaintiff as a witness regarding the Vernon machine. Evidently, he could not be handled like Schau was; evidently he was of a type different from the two Dunkleys; therefore, plaintiff did not call him as a witness.

In order to show that, prior to granting a *free* license to the California Fruit Cannery Association, plaintiff had gained knowledge of the public use of the anticipating Vernon machine in 1902, and that the granting of said free license was for the purpose of suppressing, as far as possible, proof of such antici-

pating use in any suit brought for the infringement of the Dunkley patent, defendant's counsel asked Mr. Bentley if, on February 7, 1913, before Calvin T. Milans, a Notary Public for the District of Columbia, he made the affidavit read to him as a part of the question and appearing on pages 217 to 221, inclusive, of the record herein. The objection to the question was sustained and the Court's ruling on said objection is assigned as error. We submit that the making of said affidavit and plaintiff's knowledge of the same, before the grant of said *free* license, were both facts relevant and material to the issues herein raised by the defense that plaintiff does not come into Court with clean hands. The materiality of said affidavit in respect to its acquainting plaintiff with the prior use of the anticipating Vernon machine and thus prompting plaintiff to grant such *free* license for the purpose above specified, is shown on the face of the affidavit. In it Mr. Bentley says:

ROBERT I. BENTLEY, being first duly sworn, states as follows:

"That he is forty-eight years of age; a resident of San Francisco, State of California; that since the year 1899 he has been the General Manager of the California Fruit Cannery Association;
* * * that during his experience as Manager of the said corporation he has been brought in contact with the various methods and machines employed by the corporation in its different plants in the State of California, and is familiar with

various machines used at different times for removing the peel from peaches; that during the fruit season of 1902, namely during the months of July, August and September in said year, there was installed and publicly used and operated at the factory of the California Fruit Cannery Association, the corporation above named, at Fresno, California, a machine which deponent verily believes was made by a party named Miller at Glendora, California, and which was built for the purpose of removing the peel from peaches after the peach had been subjected to or placed in an alkali bath; that the machine was purchased by the said corporation for the purpose of removing the skins from peaches and was a machine wherein two long rotary brushes were employed arranged parallel with each other and separated so as to leave a space there between and rotated by suitable mechanism; that between the brushes and slightly below the same, was an endless carrier which was connected up to the driving mechanism of the machine and was supported below its upper course by a platform or support. This carrier extended the length of the machine and was used to receive the peaches fed into the machine and to carry them forward between the brushes; that in addition to the two rotating brushes and the endless carrier there was a water pipe arranged slightly above the brushes, but directly in line with the carrier, so that the pipe lay in a plane between the two brushes and slightly above the brushes. This pipe had three rows of perforations extending throughout its length and was coupled up with the water mains of the City of Fresno. The machine was provided with a conveyor for conveying the peaches from an alkaline bath on to the endless carrier and thence by means of the endless conveyor carried forward be-

tween the brushes. As the peaches progressed through the machine and between the brushes, they were directly subjected to the jets of water issuing from the perforations in the pipe under water-main pressure and were also turned and moved by the brushes, the brushes and the *water-jets* together serving to remove the skin which had been previously treated to the alkaline bath.

* * *

"The said so-called Baker et al. machine which was used for removing the peel from the peaches, in the aforesaid corporation's factory at Fresno, California, was used publicly and openly and handled the entire tonnage of peaches as received at the said Fresno factory of the said corporation during the said months of July, August and September, 1902; and that the said pack amounted to about one hundred thousand cases of twenty-four cans each, each can containing, as deponent now verily believes, five peaches to the can. * * *"

Mr. Bentley's attitude towards the plaintiff was necessarily most friendly. He stated he considered the interests of his own company, the California Fruit Cannery Association, to be identical with the interests of the Dunkley Company in this litigation (R. 226). Of course, said interests were identical. Think of the advantage the California Fruit Cannery Association would have, in operating under a *free* license, over all its competitors compelled to pay a royalty for the privilege of using an invention covered by the Dunkley patent. *In view of the foregoing, why did plaintiff's counsel refrain from questioning Mr. Bentley regarding the Vernon machine?* Regarding

such a situation, the following remarks of Judge Brown in the case of *American Bell Tel. Co. v. National Tel. Mfg. Co.*, 109 Fed., 1018, are most pertinent:

“As counsel says, there are occasions in the world when the paucity of proof in the affirmative is positive proof in the negative. Considering the great importance of establishing by other witnesses experimental results inconsistent with Berliner’s express denial in his application, and the entire lack of any explanation of the absence of several witnesses who could testify upon this issue, the presumption is justified that the testimony of these witnesses would be unfavorable to the complainant. *If a party has it peculiarly within his power to produce witnesses, whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.* *Graves v. U. S.*, 150 U. S., 118; *Runkle v. Burnham*, 153 U. S., 216-225; *Clifton v. U. S.*, 4 How., 242.”

Plaintiff called only *one* witness to testify regarding the Vernon machine as used in 1902 and 1903 *and opposing counsel was most careful not to ask him any questions regarding the construction or mode of operation of said machine.* However, the witness made a most lamentable blunder, misunderstood one of counsel’s questions and thereby upset counsel’s carefully laid plan to keep the witness away from any discussion of the details of construction or mode of operation of said machine. The said witness, T. B. Dawson, is the Assistant General Superin-

tendent of the California Fruit Cannery Association. He testified as follows:

"Q. Were you familiar with the machinery used at the plant of the company at Fresno in the year 1902 and 3?

"A. Yes.

"Q. By what name was the process known that was used there?

"A. For peeling purposes?

"A. It was the Vernon machine.

"THE COURT—Q. In what year?

"MR. CHAPPELL—1902 and 1903.

"Q. Who installed the machine there, if you know?

"A. At Fresno, Mr. Vernon, in 1902.

"Q. Do you remember his first name?

"A. No, I do not.

"Q. Was it Charles J. Vernon?

"A. Possibly.

"Q. What became of the machine there installed?

"A. We used it I think two years; I don't know what became of it eventually.

"Q. Were similar machines installed at other places in the plants of the California Fruit Cannery Association?

"A. To the best of my recollection there were two or three machines installed in 1903; two positively; I cannot say positively about the third machine.

"THE COURT—Q. In your canneries?

"A. Yes.

"MR. CHAPPELL—Q. What became of those machines, if you know?

"A. Well, eventually they were done away with, I don't know what became of them.

"Q. What method or process followed the use of these machines?

"A. It was the use of caustic soda and we had machines with brushes for brushing the peeling off after it passed through the caustic soda; the brushes had *sprays of water playing on them*.

"Q. *I guess I did not make myself clear; what machines succeeded these machines in the plants of the California Fruit Cannery Association?*

"A. What we called the Beekhuis machine" (R. 633).

Neither before nor after the witness made the unfortunate blunder of telling about the *sprays* in the Vernon machine, notwithstanding he was not asked about said machine, did opposing counsel ask him any questions concerning the construction or mode of operation of said machine.

Notwithstanding the fact that plaintiff only called one witness, Mr. Dawson, who had any knowledge of the Vernon machine as used in 1902 and 1903 and notwithstanding the fact that he, plaintiff's own witness, corroborated defendant's witnesses in respect to the *sprays* of water being present and used in the Vernon machine, opposing counsel had the hardihood to address the lower Court as follows:

"The use by the California Fruit Cannery Association is shown to be that of a brush machine. They never had water pressure at Fresno that would supply water for a *spray*; it was a brushing-machine, and we showed by the testimony of Mr. Dawson this morning that not only was that machine which was a Vernon machine, but also the

machine at Los Angeles and also at Hanford was superseded by the machine of Beekhuis which went into interference with Dunkley, the Beekhuis patent being offered in evidence by the defense, so that so far as that is concerned we are entitled to the date of the conception of Mr. Samuel J. Dunkley for his invention in August, 1902, *it antedates any of those devices so far as they are shown to have any spray and none of them were shown to be effective until long afterwards*" (R. 653).

The witness, H. G. BAKER, who saw the Vernon machine in operation in July, 1903, said:

"Q. Describe the action of the water and of the brushes on the fruit, as you observed it at that time?

"A. The brushes themselves turned the fruit over as they touched it, and the water washed the skin off; there was not much left but this disintegrated soft pulp, like a pulp almost.

"Q. Can you describe to us the spray or jets of water as you observed them on that machine at that time?

"A. I have described the direction of these jets; these jets hit the fruit, and one of them hit directly on the fruit; the others possibly but the edge of the fruit as it went down and sure hit the brushes" (R. 108).

R. B. WAY, on the same point, testified:

"Q. Did you say this pipe was perforated? Please explain how or in what manner it was perforated?

"A. When we first set up the machine, that pipe consisted of a tin or galvanized iron, I am not positive which, and it was perforated on the

under side, and that made the *spray of water* which washed the peeling from the peach as the peach passed through between the brushes" (R. 127).

NEWTON LUSHBAUGH testified as follows regarding the Vernon machine as used in 1902:

"MR. CHAPPELL—Q. What was the relative work of the brushes and of the sprays—how did they work together on the Vernon machine, as you saw it worked during the season of 1902?

"A. What do you mean?

"THE COURT—Q. He means what was the function that the brushes performed and what did the water accomplish?

"A. I think they both worked together in removing the peeling, that is the best answer I can make.

"Q. Can't you tell more definitely the effect of each instrumentality?

"A. Well, the peaches were fed in, that is, on the upper portion of the belt running between the brushes, and as they passed on down by gravity to the lower end of the brushes, with the water *spraying* on them, it removed the skin."

Other witnesses, called by defendant, testified to the said general effect, but, in view of the testimony of Dawson, the only witness called by plaintiff as to the 1902 and 1903 operation of the Vernon machine, we can see no necessity of referring to such other testimony. *Plaintiff's said witness Dawson refutes the contentions of plaintiff's counsel regarding the absence of the spray action in the Vernon machine.* His testimony shows that the water did issue from

the perforated pipe in the form of *spray* and plaintiff did not call Bentley to contradict either its said witness Dawson or any of defendant's witnesses on that point. However, the lower Court apparently ignored or overlooked, not only all the testimony of defendant's numerous witnesses but also the testimony of plaintiff's witness Dawson and adopted opposing counsel's views on the matter.

In its opinion herein, the lower Court stated:

"It is claimed that the evidence here is in some respects substantially different from that which was presented to that Court, but I am unable to find that there is any such essential difference as to warrant this Court in holding other than in accord with the conclusion reached by the District of Columbia Court."

We have heretofore shown that the only real issue presented to the Court of Appeals for the District of Columbia was whether or not Dunkley was entitled to amend his application by inserting therein the claims he had previously seen in the Beekhuis patent and calling for "peeling jets." The remarkable feature of the lower Court's opinion is that, although on its face professing to follow the decision of the said Court of Appeals, it, in reality, is inconsistent with said decision in respect to the only point decided thereby, to wit: the mode of operation of the Dunkley machine. We have shown that the said Court of Appeals was not called on to decide the truth or fals-

ity of Dunkley's history of his invention and that the record, in the Dunkley-Beekhuis interference, differed from the record herein in respect to the most vital fact in the history of the Dunkley invention, to wit: the date of building of the model machine. Yet, the lower Court finds there is no "*such essential difference*" between said records as to warrant it "in holding other than in accord with the conclusion reached by the District of Columbia Court."

Regarding the Dunkley machine, the lower Court said:

"The plaintiff's device operates upon quite a different principle. It has the rotating brushes but has these peeling jets of water, which are themselves the efficient means of washing off the disintegrated skin of the peach after it has been put through the lye process, and the *brushes serve the subsidiary purpose of agitating the fruit and of turning it for the purpose of presenting its different surfaces to the jets of water to enable them to do the efficient work of cleansing the skin after its disintegration by the lye-bath; . . .*" (R. 698).

The foregoing findings are inconsistent with the plain language of the Dunkley patent and with the decision of the Court of Appeals allowing Dunkley to insert in his application, claims calling for peeling jets.

When one stops to consider the nature of Dunkley's application as filed on November 29, 1904, and

as prosecuted by him up to the time he saw the Beekhuis patent containing claims calling for peeling jets; when one stops to consider that up to said time, Dunkley was emphasizing the *peeling* action of the brushes in his machine without the remotest suggestion that the water spray alone could remove the disintegrated skin; when one stops to consider that various tribunals of the Patent Office decided he was not even entitled to insert claims calling for peeling jets because of the lack, in his application, of a disclosure of any such mode of operation; and finally, when one stops to consider that the Court of Appeals of the District of Columbia only allowed Dunkley to insert the "peeling jet" claims because he had mentioned water spray as striking the peach, and, in its opinion, said "spray" would necessarily assist the brushes in removing the disintegrated skin, it is certainly most astonishing to find opposing counsel now contending and the lower Court finding that the Dunkley machine is one in which jets or sprays do the peeling and the brushes merely turn and advance the peaches! In other words, the Dunkley machine went into the Patent Office with all the emphasis on the brushes as the principal peeling means and came out of that office as one with all the emphasis on the water-spray as the principal peeling means; the said change having been brought about by reason of Dunkley seeing the Beekhuis patent!

However, the decision of the Court of Appeals

for the District of Columbia prevents the Dunkley patent from being properly given any such construction. That Court stated:

“It is to be observed that none of the counts define the water jets as constituting the sole peeling means. The counts of the issue are satisfied by a construction in which peeling water jets enter into the operation of removing the skins whether they be exclusively employed to remove the skins or not. And in neither machine as described and constructed are the water jets shown to be the exclusive means of peeling.”

If the counts “are satisfied by a construction in which peeling water-jets enter into the operation of removing the skins, whether they be so exclusively used or not, then the said counts are anticipated by a structure in which peeling water jets enter into the operation of removing the skin, whether they be so exclusively used therein or not. We have heretofore shown that the words “peeling jets” are not found in the Dunkley application as filed, the term water spray having been held an equivalent expression. The testimony of witnesses, called by both parties, show the action of the water spray in the Vernon machine. Said spray or jets necessarily assisted or “entered into” the peeling operation and, therefore, said Vernon machine is an anticipation of the Dunkley peeling jet claims, according to the construction thereof by said Court of Appeals. As said by that Court, in reference to the Dunkley machine: “This comprises in

“ the combination the jets of water which he evidently
 “ realized aided in the removal of the skins when dis-
 “ integrated by the alkali solution. That he did not
 “ realize the full extent of their agency cannot de-
 “ prive him of the benefits accruing from their use.”

Can it be seriously contended that Vernon, and the others familiar with the operation of the Vernon machine in 1902, did not realize that the water spray or jets aided in the removal of the skins? Can it be seriously contended that, in the operation of said machine, in 1902, said water spray or jets, striking the peaches, did not aid in the removal of the disintegrated skin? If said spray or jets did so aid in the removal of the skins, and the uncontradicted testimony of the witnesses shows it did, then the Vernon machine must be held a complete anticipation of the Dunkley patent.

We have heretofore referred to the fact that, in the Dunkley machine there was actually more *brushing* surface provided than in the Vernon machine, thus showing that the peeling action of the *brushes* was more relied on in the Dunkley than in the Vernon machine. The endless belt or carrier, in the Dunkley machine, is made up of brushes and Dunkley expressly states said carrier not only conveys the peaches but *brushes* them. The corresponding carrier in the Vernon machine did not have a surface made up of *brushes*, as said carrier served only to convey the peaches.

The significance of said Court of Appeals decision is to be found in its statement:

“But let it be conceded that Dunkley was not fully aware of the effective action of the jets of water and relied chiefly upon the action of the brushes to remove the skins;”

In other words, in the opinion of the Court, it was immaterial whether or not the brushes, in the Dunkley machine, were the principal means for removing the skin, *provided the water spray or jets aided in such operation*. If said spray aided in the peeling operation, then, in that Court's opinion, Dunkley was entitled to claims covering such spray or jets as peeling spray or jets. Therefore, it is immaterial whether or not, in the Vernon machine, the brushes were chiefly relied on to remove the skin, provided the water spray or jets therein *aided* in the removal of the skin. If the said spray or jets so *aided* in the removal of the skin, then the Vernon machine, equally with the Dunkley machine, must be held to embody “peeling jets” and, therefore, must be held to be a complete anticipation of the Dunkley patent.

Plaintiff's only witness, beside Dawson, who testified regarding the Vernon machine, was Mark E. Fontana. Fontana took charge of the Fresno plant of the Association in 1904. In the spring of 1902, before the Vernon machine was built, and in the summer of 1903, before the machine was in operation, he visited the plant (R. 474). Therefore, he did not

see said Vernon machine in operation at the Fresno plant, either in 1902 or in 1903. Plaintiff's witness Dawson said that said machine was used two years.

"A. We used it I think two years; I don't know what became of it eventually" (R., 633).

In 1904, Fontana increased the pressure of the water running to the spray pipes by substituting a larger pipe from the main water line and putting in a new pump in the place of the one he found there (R. 472). He says he also put some spray pipes over the conveyors in the water tanks and over some of the chutes in the line of apparatus (R. 472). Whether the Vernon machine was used in 1904, or whether the Beekhuis machine was substituted in its place that year, does not appear from Fontana's testimony. However, according to Dawson, the Vernon machine was used only in 1902 and 1903. Therefore, what Fontana did in 1904, in reference to putting in spray pipes, must have been in connection with the Beekhuis machine. As Dawson said:

"Q. I guess I did not make myself clear; what machines succeeded these machines in the plants of the California Fruit Cannery Association?"

"A. What were called the Beekhuis machine" (R. 634).

The substance of Fontana's testimony is, therefore, that the water pressure was increased at Fresno in 1904, in connection with the sprays used in the Beek-

hais machine; the shaker device of said machine having been substituted for the brush mechanism of the Vernon machine.

Regarding the wide range of pressures that could be successfully used in the operation of the Dunkley machine, Melville Dunkley said:

"A. We have used pressures of from perhaps 40 to 125 pounds.

"Q. And when you increased from 40 pounds to 125 pounds were you enabled, by reason of such change, to use a caustic soda solution of less strength?

"A. The pressure which gives you the best results in the use of all of the work of the output, that is, that allows you to use the minimum of caustic soda and the minimum of water consumption from our experience has proven to be around 70 to 75 pounds.

"THE COURT—What counsel is asking you is this: *Does the greater pressure enable you to use a weaker solution in the disintegrating process?*

"A. The pressure from 40 pounds raised to 70, will allow you to do that, and will save the use of caustic soda; I do not believe that the raise from 70 pounds up will be of much benefit" (R. 91).

In view of the foregoing, it is obvious that Fontana's act of increasing the water pressure at Fresno in 1904 has no bearing on the question whether or not the Vernon machine, as used in 1902 and 1903, employed jets or *sprays* to aid in the peeling operation.

The Dunkleys do not pretend to have used a pres-

sure in excess of about 40 pounds at any time prior to the filing of the Dunkley application in November, 1904, or in other words, at any time prior to the 1905 peach season. In the lower Court, Mr. Chappell said that "*in the law of patents the last step wins.*" That is true in one sense but it is not true in the sense that Dunkley was *the last* to take every step in the development of the peach peeling machine.

The record shows that Grier was the first to perceive the advantages of using water under pressure of 70 pounds or more. He was using such a pressure as early as the 1902 peach season and continued the use thereof during the subsequent peach seasons. It will be recalled that E. H. Kennedy, in 1903 Superintendent of the Los Angeles plant of the California Fruit Cannery Association, wrote, on August 5, 1903, to said Association, at San Francisco, regarding the manner in which Grier was peeling his peaches. In his said letter, Kennedy said:

"Grier works part of his fruit with the soda system and has an arrangement of putting the fruit under hydraulic pressure of water after it has been treated by the soda, or in other words he has the water under about *70 pounds pressure* and directs this against the fruit to remove all effects of the soda as well as peeling dirt, etc., and last season they turned out some very nice goods with it; have not heard what they are accomplishing with it this season and they only commenced work on peaches two days ago and do not know if they have used it or not this season."

At the very time Kennedy wrote said letter, *showing his complete knowledge and understanding of the use of peeling jets of water to remove the disintegrated skin*, there was being used, under his superintendency, at the Los Angeles plant of the California Fruit Cannery Association, one of the Vernon machines, having a capacity larger than the 1902 Fresno machine (R. 394). Regarding the said skin-removing means used in said Vernon machine, Kennedy said:

"The fruit was discharged from this draper on the elevator and elevated up about 4 feet high and at the top there we had a device for separating the peaches into three different runways, and the fruit fell on to three different belts, each belt running parallel between the brushes; right over these brushes were water-pipes for *spraying* the fruit and brushes . . ." (R., 395).

It appears, therefore, that Kennedy, in August, 1903, fully understood the nature of the peeling action then being performed by the *sprays* in such Vernon machine. By means of said Kennedy letter of August 5, 1903, the California Fruit Cannery Association headquarters at San Francisco, as early as August 6, 1903, had knowledge of the use of water jets under a 70-pound pressure and, no doubt, it was such knowledge that prompted that Association, through Fontana, to still further increase the water pressure at Fresno for the 1904 season by the substitution of a larger pipe line and of a pump larger than the one installed in

August, 1902, for the purpose of increasing the pressure at that time.

As Melville Dunkley said, an increase in the water pressure enables one to use a weaker solution of caustic soda. The water pressure at Los Angeles was evidently such as to require a strong solution of caustic soda. For that reason, a neutralizing agent was used there in connection with the use of the Vernon machine and only second grade peaches were operated on (R. 400-1). However, that fact had nothing to do with the peeling operation of the Vernon machine. Kennedy, at that time, was perfectly familiar with the use of water jets under a pressure of 70 pounds to remove the peel. His letter of August 5, 1903, conclusively proves that. However, if he did not have such a pressure, he was compelled to do just what Melville Dunkley said had to be done in such a case, to wit: use a stronger caustic soda solution, which necessitated the use of a neutralizing agent. With the use of such a stronger solution, the jets, under a much less pressure, would of course remove the disintegrated skin.

The record shows that practically the entire 1902 output of the Fresno cannery was handled on the Vernon machine. The exact amount of said output does not appear in the testimony herein, although it can be obtained by reference to the affidavit of Mr. Bentley, who places it at about 100,000 cases of 24 cans each.

It must be constantly borne in mind that the use of a peach peeling machine involves a consideration of many factors not dependent upon the mechanical construction of the machine. The proper strength of the lye solution varies according to the variety and condition of the fruit, as does the proper time of submersion therein vary in accordance with such other factors. The handling of the peeled fruit also presents the problem of preventing it from discoloring. All these factors had to be determined in the early days in connection with the peeling of half peaches, but none of them pertained to the construction of the machines or to their mechanical operation. The Dunkley patent is silent as to all said matters.

The Vernon machine was commercially used throughout the 1902 peach season. The product turned out by it, necessarily must have been a merchantable article. Such an institution as the California Fruit Cannery Association, would not use a machine throughout an entire season if the product being turned out by it was not merchantable. The practical and commercial success of said 1902 use of said machine is demonstrated by the fact that the California Fruit Cannery Association made three more of said machines for use during the 1903 season. Said fact is much more persuasive as to the commercial efficiency of the Vernon machine than any speculations of opposing counsel to the contrary.

As before pointed out and as so forcibly and em-

phatically stated by Mr. Chappell and Melville Dunkley, the commercial efficiency of such a brush machine necessarily depends upon the peeling action of the *spray*. As stated by Mr. Chappel, even if the peach was *slowly conveyed* through such a machine "*the brush would simply move the peel to another place on the surface and it would not be gotten rid of; it needs the active agency of a spray of water striking against the peach to dash the disintegrated peel from the surface*" (R. 56).

Therefore, the only possible explanation of the commercial success of the Vernon machine in 1902 and the only explanation of the California Fruit Cannery Association building three more of said machines in 1903, is that, in the operation of said Vernon machine the spray or jets of water entered into and aided the peeling operation.

In view of the public use of said Vernon machine for more than two years prior to the Dunkley application, it is not difficult to surmise the *quid pro quo* the Dunkley Company expected to receive by granting a *free* license to the California Fruit Cannery Association.

As stated before, Vernon made no effort to patent the mechanical features of his machine. He undoubtedly thought there was nothing patentable in his line of apparatus because the same comprised a number of old devices hooked up together and adapted for use as a peach peeling device. Grier also took the same

view of his own machine and he made no attempt to patent it.

Opposing counsel attempt to make much capital out of the fact that the Vernon machine gave way to an improved and superior machine of the Grier and Beekhuis type. Of course, they ignore the fact, that incidentally said Grier type of machine also prevented the Dunkley brush machine from going into any general use. Not ten Dunkley machines have ever been built, even though the Dunkley Company has had since 1903 in which to exploit such type of machine. However, merely because a machine gives way to subsequent and superior machines, does not mean the first machine was not a commercially practical machine. The Dunkley patent is not void, merely because no one to-day could think of using the Dunkley brush machine in preference to an up-to-date machine. A perfect machine is a *rara avis* and nothing is simultaneously invented and perfected.

The Vernon machine was the pioneer machine for removing the disintegrated skin from fruit. It embodies means for supporting and advancing the fruit and subjecting the same to the action of peeling jets or spray. *What details of construction and what data are disclosed in the Dunkley patent that would enable one to build a machine more efficient than the Vernon machine?* The Dunkley patent points out no particular water pressure, no particular sized jets or perforations or number of perforations, no par-

ticular strength of caustic soda solution, no particular speeds and no particular dimensions, but leaves all those matters and details to the judgment of the one attempting to build a machine in accordance with the disclosure thereof. Therefore, what could one, familiar with the Vernon machine, learn by studying the Dunkley patent? Nothing. *Subtract the Vernon machine from the Dunkley disclosure and nothing is left of a patentable nature.* The fact the Vernon patent was cited during the prosecution of the Dunkley application is of no significance. We have already pointed out that the Vernon patent does not describe or clearly show the brush mechanism or any spray pipes used therewith. Therefore, the Patent Office, in considering the Vernon patent, was not considering the *Vernon machine as actually used.*

The fact that both the Dunkley and Vernon machines have made way for improved types of machines is of no significance. As said by this Court in *von Schmidt v. Bowers*, 80 Fed., 150:

“The contention on the part of counsel for the appellant that no successful machine can be built and operated in accordance with the complainant’s patents is not at all supported by the record, which contains abundant evidence to the effect that machines have been so built, and have ever since been operated with very great success. The fact, if fact it be, that the first machine built by the complainant (called in the record the ‘Davis Machine’) was not successful in operation, is unim-

portant. As well said by the court in answer to a similar objection in the case of *Mergenthaler Linotype Co. v. Press Publishing Co.*, 57 Fed., 502, 506:

"It would certainly be a novel doctrine to deny to an inventor the fruits of a broad invention because the machine which first embodied it was rudimentary in character, and failed to do as good work as improved machines made subsequently. None of the great inventors could survive such a test. Ten years after the invention of Howe, the machine first made by him would hardly have satisfied the least exacting sewing woman. The Dodds and Stephenson locomotive would, only a short time after its construction, have been discarded as behind the age, even by the savages of Tasmania. The telephone of Bell is not the perfected telephone of commerce. The Morse telegraph is looked upon to-day as an interesting antique. And yet it would be an unheard of proposition to withhold from these illustrious men the credit they deserve because their machines were crude at first, and were improved afterwards.'"

In order that this Court may fully appreciate the significance of the decision of the Court of Appeals of the District of Columbia in the *Dunkley v. Beekhuis* interference proceeding, we also annex, at the end of this brief, a copy of the opinion rendered in said interference by the Examiner of Interferences. The nature of the various decisions respectively rendered by the various patent office tribunals, is thus stated in the opinion of the Court of Appeals:

"The Examiner of Interferences differed with

the Primary Examiner and awarded priority to Beekhuis. On appeal to the Examiner-in-Chief this decision was reversed; one member dissenting. On appeal to the Commisisoner that decision was reversed, and priority awarded to Beekhuis."

CONCLUSION.

It is quite apparent from the record herein that no act of S. J. Dunkley had the slightest effect on the development and progress of the peach peeling machine art. That art was developed in California. It reached its present state of perfection independently of anything done by Dunkley. He contributed absolutely nothing to the art. He trailed behind all the others in respect to every step taken in the art. He was the very last to take every step in advance. The Vernon machine was in successful, commercial operation before he ever thought of a peach peeling machine. Grier was using jets, under a 70-pound pressure, to remove the disintegrated skin, before Dunkley ever thought of a peach peeling machine. The Grier machines were in successful, commercial operation before Dunkley ever thought of a peach peeling machine. Before Dunkley even had completed, in 1904, his first commercial spray-brush machine, the art, in California, had progressed beyond the combined spray-brush machine and, in the 1904 season, the peach peeling machines used in California did not employ any brushes to assist in the peeling operation. As stated

before, Dunkley contributed absolutely nothing to the art and, therefore, the public owes him nothing.

We respectfully submit that the decision of the lower Court should be reversed and these suits ordered dismissed.

Respectfully submitted.

WILLIAM K. WHITE,
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Solicitors and Counsel for Defendant-Appellant.

COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.*Dunkley v. Beekhuis.*

Decided January 6, 1913.

Mr. F. L. Chappell for the appellant.

Mr. L. S. Bacon, Mr. J. H. Milans, and Mr. T. Walter Fowler for the appellee.

SHEPARD, C. J.:

Appeal from decision of the Commissioner of Patents in an interference proceeding.

The invention involved is a device for peeling fruit in which jets *or sprays* of water are employed as a means for performing the peeling operation.

The counts of the issue are four in number:

1. In an apparatus for treating fruit such as peaches, means for removing previously disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position of the fruit on said support, and means for directing peeling water jets upon said fruit.

2. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing a peeling water jet upon said fruit as it advances.

3. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of

means for directing peeling jets of water at intervals upon said fruit as it advances.

4. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit of means for directing peeling jets of water at intervals upon said fruit from above and below as it advances.

All the tribunals of the Office found that Dunkley was the first to conceive and reduce to practice, provided he was entitled to make the claims of the issue, and this decision was undoubtedly right.

This presents the single issue of the case, and there is direct conflict in the decisions of the several tribunals passing upon it in succession. A motion to dissolve by Beekhuis on the ground that Dunkley was not entitled to make the claims, was referred, in the first instance, to the Primary Examiner and by him denied. The question was reserved and presented on the hearing. The Examiner of Interferences differed with the Primary Examiner, and awarded priority to Beekhuis. On appeal to the Examiners-in-Chief this decision was reversed; one member dissenting. On appeal to the Commissioner that decision was reversed, and priority awarded to Beekhuis.

The decision turned on the effect of the words "peeling jets of water," which are found in each claim. These words were first used in the claims of Beekhuis to whom patent issued pending the application of Dunkley, and his claims were copied by

the latter for the purpose of procuring the declaration of interference.

The common use of the peeling machine is the removal of the skin from peaches. Before introduction into either machine the fruit passes through a receptacle where it is subjected to a bath in a hot solution of lye, which disintegrates the skin and makes it readily removable. In Dunkley's device, the fruit from the bath is delivered on to an endless belt conveyor and passes between rotary brushes for about six feet. The brushes are in sections of fiber, and sponge. These revolve apparently at different rates, and rotate the peach as it is carried along by the conveyor-brush. Three perforated pipes are arranged along the passage—one at each side and one above—so that the jets or sprays of the nozzle perforations are directed against the line of passing fruit, striking the fruit tangentially and tending to impart a rotary movement to each as it advances in single file to the point of exit.

The Bekhuis machine has a large box-screen of wire mesh arranged so as to shake the peaches as they pass over it; the peaches having been submitted to the skin-disintegrating bath and cut in halves. Above this shaking-screen is arranged a water pipe at a distance of twelve or fifteen inches, with transverse slits at intervals, which deliver a broad fan spray or jet of water on to the fruit passing over the screen. Another pipe arranged below the screen delivers a

similar spray or jet upon the under side. The fruit is delivered by hand through a feed spout and falls in a mass upon the screen. There it is subjected to the water jets as it passes. The jets assist, and, doubtless, chiefly remove the disintegrated skin. They also cool the fruit after its subjection to the hot lye solution, wash it and prepare it for canning. The effect of the shaking in the box-screen is described as follows:

This agitation, shaking or dancing to which the fruit is subjected has the triple effect of, first, advancing the fruit to its discharge from the lower end of the box; second, of occasioning sufficient friction, both between the individual specimens themselves and between them and the screen bottom and sides of the box to assist in removing the skin; and, third, of presenting every portion of the fruit, at some time throughout the course of its travel, to the action of the water jets or sprays from the pipes 15 and 19. As the fruit travels through the box under the constant agitation of shaking described the water jets or sprays from below and above serve to fully remove the particles of skin.

The Commissioner was not satisfied with the evidence of Dunkley relating to the operation of his machine—which peeled peaches rapidly and satisfactorily—that the jets of water had anything more than a washing operation, and was of the opinion that this was all that Dunkley contemplated. It would be practically impossible for any witness to

testify to the actual fact that the skins were chiefly removed by the water jets in Dunkley's machine, for the reason of the rapid passage of the fruit and its concealment. Without pausing to discuss the criticism by each party of the jet or spray of the other, we think it apparent that the jet of Dunkley would have the effect to remove the skins as well as to cool and wash the fruit for the canning process. The skin of the peach having been disintegrated by the action of the hot solution of lye, that is to say, cut or broken and loosened from the pulp, was, to say the least, as easily removed by one jet as the other. But let it be conceded that Dunkley was not fully aware of the effective action of the jets of water and relied chiefly upon the action of the brushes to remove the skins; and, on the other hand, that Beekhuis relied chiefly on the water jets, yet the latter, as we have seen, relied upon the friction of the peaches with each other and the screen to assist in removing the skins, while the water jets had the additional function of cooling and washing the fruit. It is to be observed that none of the counts define the water jets as constituting the sole peeling means. The counts of the issue are satisfied by a construction in which peeling water jets enter into the operation of removing the skins whether they be exclusively employed to remove the skins or not. And in neither machine, as described and constructed, are the water jets shown to be the exclusive means of peeling. Since stress is laid upon the

words "peeling jets," it must be noted that no such words occur either in the specification, or the original claims of Beekhuis, whose application was filed May 25, 1904. They first occur in amended claims filed October 21, 1904, and were thereafter embodied in all of the allowed claims. As shown by the described and exhibited structures, both parties first subjected the fruit to the hot lye solution to effect the disintegration of the skin. Beekhuis agitates the fruit in his box-screen so as to partially peel it. Dunkley passes the fruit between his brushes to assist in peeling. Beekhuis subjects the fruit to the water jets or spray to "fully remove particles of skin," and for the purpose of "assisting in turning the fruit." Dunkley subjects each piece of fruit to jets of water from three pipes, which strike the fruit tangentially with sufficient power to turn it. These, with the brushes, remove the skins, and, being extended beyond the brushes, remove any remaining particles of skin. This is described as a "water brushing action." In both, the water serves to cool, wash and rinse the fruit and make it ready for canning.

We agree with the Primary Examiner and the majority of the Examiners-in-Chief that there is a great similarity in each application in so far as showing the functions performed by the water jets in the peeling operation; and that both parties are equally entitled to make the claims in interference.

A sufficient foundation for the claims is in Dunk-

ley's description to the effect that the peaches (after preparation) are delivered in single file line to a brushing and washing mechanism, which preferably comprises

a group of three long, perforated pipes for spraying water upon the moving line of peaches and subjecting them to *water brushing action*, an endless belt brush arranged between the two lowermost perforated pipes and operating to brush the peaches as they are rotated and to convey them along, and a pair of opposite rotating cylinder brushes operated both to rotate and brush the peaches, and having hollow perforated pipe cores for spraying the rotary brushes with water, and rotary cylindrical rubber sponge brushes, also having hollow perforated pipe cores for supplying the same with water; whereby the peaches may be very rapidly and cheaply and perfectly peeled without any waste or injury.

Again he describes the delivery of the line of peaches—

between water pipes and brushes of the washing and brushing mechanism by which the softened and loosened and shriveled skins of the peaches are removed, and the peaches thoroughly washed and freed from all taint or trace of the skin softening or loosening liquid. This washing or brushing mechanism comprises a group of, preferably, three water pipes G, having a series of perforations g, arranged to strike the peaches tangentially as they are conveyed along between the pipes.

And, again, the description says that the perforated water pipes extend beyond the rotary brushes, so that

the water spray may entirely free the surface of the peaches from any particle of skin or peel.

Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches. This comprised in the combination the jets of water which he evidently realized aided in the removal of the skins when disintegrated by the alkali solution. That he did not realize the full extent of their agency cannot deprive him of the benefits accruing from their use.

His specifications and construction afforded sufficient foundation for the claims; and as he was the first to conceive the idea and reduce it to successful practice, he is entitled to the award of priority. The decision will, therefore, be reversed; and this decision will be certified to the Commissioner of Patents.

Reversed.

Final Hearing

Paper No. 66

October 3, 1910.

LBF

IN THE
UNITED STATES PATENT OFFICE

Dunkley vs. Beekhuis

Patent Interference No. 30610.

MACHINE FOR PEELING FRUIT.

Application of Samuel J. Dunkley, filed November 29, 1904, Serial No. 234,715;

Application of Hermanus Albert Beekhuis, filed May 25, 1904, Serial No. 209,648, patented September 3, 1907, No. 864,944.

Messrs. Chappell and Earl, attorneys for Dunkley;
Mr. Wm. F. Booth and Messrs. Bacon and Milans,
attorney for Beekhuis.

This interference involves the application of Samuel J. Dunkley, filed November 29, 1904, and a patent No. 864,944, issued September 3, 1907, on an application of Hermanus A. Beekhuis, filed May 25, 1904.

The invention in controversy relates to a device for peeling fruit in which jets or sprays of water are employed as the means for performing the peeling operation. Devices of this kind are designed to operate on fruit, which has been previously subjected to a solution such as caustic soda, for the purpose of loosening and disintegrating the skin of the fruit. The fruit thus treated is caused to pass through the peeling apparatus, and during such passage the jets or sprays of water are directed upon the fruit so as to remove the skin which has been previously disintegrated.

The issue is defined in four counts as follows:

1. In an apparatus for treating fruit such as peaches, means for removing previously disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position of the fruit on said support, and means for directing peeling water jets upon said fruit.
2. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of

means for directing a peeling water jet upon said fruit as it advances.

3. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit as it advances.

4. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit from above and below as it advances.

Both parties have taken testimony. The party Beekhuis is a patentee, but this fact entitles him to no additional advantage as regards the burden of proof, because his application was co-pending with that of Dunkley (*Paul v. Hess*, 115 O. G., 251).

The dates alleged in the preliminary statements of the respective parties are as follows:

	<i>Dunkley</i>	<i>Beekhuis</i>
Conception	August, 1902	July, 1903
Disclosure	Sept., 1902	July, 1903
Reduction to Practice	July, 1903	February, 1904

The testimony in behalf of Beekhuis shows that about July, 1903, he performed certain experiments in peeling fruit by the use of jets of water. Beekhuis testifies (Q. 10) that he used a hose to direct a jet of water upon peaches which had been treated with a skin disintegrating solution and that he discovered that the jets would perform the operation of

peeling the fruit. His testimony in regard to these experiments is corroborated by that of witnesses Fontana and DeRegt. These experiments apparently proved to Beekhuis that the idea of using jets of water for peeling the fruit was a feasible one. They do not show, however, that at this time, Beekhuis had a full conception of any mechanism by which this idea was to be carried into practical operation. In fact, Beekhuis practically admits (Q. 10, page 12) that he had no conception of any such mechanism when he states that the question of how to manipulate the fruit and use the water jets would have to be worked out. The testimony of the other witnesses is also deemed insufficient to show that Beekhuis had a conception of the invention in July, 1903, or at any time prior to the building of his first machine, which was in the early part of 1904. The testimony shows that this machine was completed about February 1, 1904, and was first successfully operated in the following summer. It is also clearly shown that said machine included the invention in issue, and its successful operation about June, 1904, entitled Beekhuis to that date for reduction to practice of the invention.

Dunkley claims to have conceived the invention in August, 1902, and to have reduced the same to practice by the construction of a peach-peeling machine in July, 1903. He also claims to have built a second machine of larger capacity in September of that year. It is unnecessary to consider the evi-

dence in regard to Dunkley's conception of the invention. If the machines above referred to contained the invention in issue and were actually built and successfully operated at the time alleged, it is clear that Dunkley is entitled to a reduction to practice of the invention prior to any date of conception satisfactorily established by Beekhuis.

The evidence is deemed sufficient to show that two peach-peeling machines were built by Dunkley at the time alleged. Dunkley himself testifies (Q. 17-20) that the first machine was built in July, 1903, and the second machine in September, 1903. He also testifies (Q. 50) to the effect that these machines were used to a considerable extent in peeling fruit for canning purposes during 1903, and that their operation was satisfactory. Witness M. E. Dunkley also testifies (Qs. 29, 40) in regard to the building and use of these machines in 1903, and his testimony corroborates that of the applicant Dunkley. The testimony of witnesses Wing and Newton is also to the effect that peach-peeling machines were built and used by Dunkley during the summer and fall of 1903. This evidence satisfactorily establishes that Dunkley built and successfully operated fruit peeling machines at least as early as the fall of 1903, and he is therefore entitled to that date for reduction to practice of whatever invention was included in these machines.

The question of whether or not Dunkley is entitled to make the claims in issue will now be considered.

In so far as the invention in issue is concerned, the machine described in Dunkley's application appears to be substantially the same as those shown to have been built by him in 1903. On behalf of Beekhuis, it is strenuously contended that the machines built by Dunkley did not involve the invention in issue and that he has not disclosed in his application any structure upon which the claims of the issue can be properly predicated. Dunkley insists that the invention was clearly included in his machines and is disclosed in his application and that he is therefore entitled to make the claims. It is clear that this is the pivotal question in the controversy. If Dunkley's early machines as described in his application involved the invention, he has shown reduction to practice prior to any established date of conception of his opponent, and Dunkley must therefore prevail. If his application does not disclose the invention, it is clear that Beekhuis is entitled to an award of priority.

It appears from the record that more than a year after the grant of the patent to Beekhuis, Dunkley copied a number of claims from said patent and requested that an interference be instituted. After the interference was declared Beekhuis brought a motion to dissolve urging that Dunkley had no right to make the claims. The Primary Examiner granted the motion as to several of the counts but denied the motion as to those counts which constitute the issue of the

interference. He held that the disclosure in Dunkley's application was sufficient to entitle him to make the claims of the issue.

Referring to the counts of the issue, it will be found that each one includes as an element, means for directing peeling jets of water upon the fruit. It is this element which is claimed to have been absent from the Dunkley machine and never disclosed in his application until after the issuance of the Beekhuis patent.

The expression "peeling jets" originated in Beekhuis' application and it will be well to first consider the Beekhuis machine in order to determine the significance of this expression. His machine includes a water pipe 19 which extends longitudinally above the screen over which the fruit advances. Another pipe 15 is similarly placed beneath the screen. These pipes are provided with transverse slits so as to furnish fan-shaped jets which strike the fruit in its passage over the screen. It is evident that these jets perform the principal part of the peeling operation. Beekhuis' specification states that as the fruit passes over the screen the friction between the individual specimens themselves and between them and the screen serves to assist in removing the skin, but such action is apparently only incidental. The jets of water are obviously the means principally relied upon in this machine for peeling the fruit as well as for washing away the disintegrated skin.

In the Dunkley machine the fruit is delivered to an endless conveyor brush by which it is carried between two parallel rotary brushes arranged so as to revolve transversely to the direction of travel of the conveyor brush. The rotary brushes as described in the application are composed of brush fibre for a portion of their length and of sponge rubber for the remainder thereof. Those shown in the exhibit, which is a section from Dunkley's second machine, are composed entirely of brush fibre. As stated by Dunkley in his testimony and as shown by the exhibit, the rotary brushes are about six feet in length. Dunkley also provides means for directing jets of water upon the fruit during its passage through the brushes, such means comprising three perforated pipes placed parallel to the rotary brushes and arranged, one above the line of travel of the fruit and the other two on either side of the conveyor brush.

It is Dunkley's contention that in his device the peeling operation is performed primarily by the jets of water and that the brushes are designed merely to rotate the fruit so as to present all parts thereof to the action of the jets. This is a theory of operation, which, it must be admitted, was not clearly and definitely set forth in Dunkley's original application. *On the contrary, his original idea seems to have been that the brushes were the means intended to peel the fruit and that the jets were provided in order to furnish water to clean the fruit and wash away the loos-*

ened skin. This is the idea which was persistently followed during the early prosecution of the case. The arguments and claims presented from time to time abound in expressions which indicate that the brushes were regarded as the means for peeling the fruit. A few instances of this may be pointed out.

In the argument filed April 14, 1905, it is stated that the rubber sponge brush has been found "peculiarly adapted to perform a certain function, portion or state of the work . . . *in peeling* the peach successfully." Present claim 3, submitted in December, 1905, contains the expression "*skin removing and conveying brushes.*" Claim 2 submitted at the same time contains the expression "a *brushing mechanism for operating on the skins of the peaches*" and also the expression "means for spraying the peaches during the *brushing operation.*" Claim 16 in the same paper refers to "brushing mechanism for *removing the skins* of the peaches consisting of the combination of an endless belt conveyor brush and rotary brushes." A number of the claims which have been presented include spraying means for washing away the loosened skin in connection with the brushes for loosening and removing the skin. Some of the claims, however, omit all reference to spraying means including only the brushes as the means for peeling the fruit. An example of this is present claim 20 which reads as follows:

In a peach peeling machine, the combination of a tank wherein the skins of the peaches are loosened, stiff brushing devices for preliminary abrading or scouring such loosened skins, soft brushing devices for subsequently acting on such abraded skins to remove the same without injury to the pulp of the peaches, and means for causing the travel of the peaches through the tank and said brushing devices substantially as set forth.

It seems evident from the statements above quoted and many similar ones which might be cited, that Dunkley considered his machine as one in which the brushes performed the function of abrading and removing the skin and that the jets or sprays were intended merely as a washing means.

Furthermore, it is believed that prior to the time that the claims were adopted from the Beekhuis patent there was no statement in Dunkley's application which would clearly indicate that the jets would peel the fruit or that they were intended to perform this function. There are several expressions in the original specification, which, it is now insisted, furnish a basis for the claim that the jets in Dunkley's machine are "peeling jets" and that they operate in the manner set forth in the counts. One of these expressions is found on page 1 of Dunkley's application, about line 16, and is as follows:

"My invention consists in" . . . "a chute or device for delivering the peaches in single file line to a brushing and washing mechanism, and a

peach brushing and washing mechanism, preferably comprising a group of three long perforated pipes for spraying water upon the moving line of peaches, and subjecting them to water brushing action."

Also on page 4, about line 26, occurs the following expression:

"This washing or brushing mechanism comprises a group of, preferably, three water pipes G, having a series of perforations g arranged to strike *the peaches* as they are conveyed along between the pipes, and thus to impart to the peaches a rotary movement."

These expressions as well as the testimony make it clear that the jets were arranged so as to strike the fruit and the statement that the fruit was subjected to a "water brushing action" appears, when standing alone, to indicate that the jets were intended to perform the function of peeling the fruit. However, when this statement is considered in connection with the rest of the specification, it becomes very doubtful whether or not the jets would perform or were intended to perform any such function. Considered in the light of the rest of the specification, and of the amendments offered from time to time, a more reasonable interpretation of this language would appear to be that Dunkley's machine is a washing and brushing mechanism including as one element the pipes for spraying the water and that such element in connec-

tion with the brushes subjects the fruit to a water brushing action.

These statements in Dunkley's specification would be of far greater weight if there was anything in the record of his application prior to the beginning of this controversy which indicated that the jets were designed to accomplish any such function as that now ascribed to them. But when the record is examined, it is found that, for more than four years during which the application was prosecuted before the Office, Dunkley's machine was constantly and persistently referred to as a brush machine and there is not so much as a clear intimation to the effect that the jets or sprays were intended to perform the peeling operation.

A consideration of the machine or portion of a machine offered in evidence serves only to increase the doubts as to whether Dunkley's device would operate as it is now claimed it operates. *All of the brushes are composed of comparatively stiff fibre and the spray pipes are provided with small openings of about the size of an ordinary pin, these openings being spaced about an inch and a half apart along the length of the pipes.* As previously stated, the rotary brushes are about six feet in length and these brushes are designed to act on the fruit as it is carried along by the conveyor brush. These brushes, it is now contended, serve principally to rotate the fruit and that the jets perform the work of peeling the same. But

it seems unreasonable to suppose that the brushes in Dunkley's machine were designed primarily for the purpose stated. *On the contrary, it appears evident from an examination of the exhibit that the fruit would be subjected to a severe action by the brushes which would perform the principal work in removing the softened skin.* If the brushes are intended merely to rotate the fruit, it is not understood why the force exerted by the brushes in rotating the fruit would not also be sufficient to peel the same and why the jets would remove the skin which was unaffected by the stiff fibers of the brushes. It is true that the spray pipes in Dunkley's machine are near to the fruit but the jets are small and it is not believed that the mass of water in these jets would be sufficient to have any appreciable action in removing the skin which had resisted the peeling action of the brushes as they rotated the fruit. *It seems apparent, therefore, that Dunkley does not rely upon jets of water as the principal means for peeling the fruit but that his machine, as repeatedly stated in his record, is one in which the brushes remove the skin which is subsequently washed away by the jets or sprays.*

The evidence offered in behalf of Dunkley as to the mode of operation of his machine may now be examined. Dunkley himself testifies that the machines were meant to peel the fruit by means of jets of water and witnesses M. E. Dunkley, Verhage and Wing, have also testified to the same effect. All this

testimony, however, appears to be based entirely on theory, and no facts are given to substantiate the statements of the witnesses. The inventor Dunkley states (Q. 50) that a peach could be run through the machine with the brushes removed and would be perfectly peeled, but later he practically admits (XQ. 227, 228) that he has never tested the action of his machine in this way. He also admits (XQ. 229) that the use of the brushes has never been discontinued. When cross-examined, Dunkley repeatedly stated that the fruit passes through his machine so rapidly that it is impossible to determine just what action takes place (Dunkley, XQs. 119, 197, 199, 200, 252). It would appear, therefore, that Dunkley's testimony in regard to the action of the jets, must be based entirely upon his opinion as to what takes place in his machine. In fact, he admits (XQ. 199) that part of his testimony as to movements of the fruit was purely an assumption on his part.

Witness M. E. Dunkley on direct examination states (Q. 35) that the movements of the fruit are so rapid that it is difficult to describe the effect of the jets of water. On cross-examination he admits (XQ. 132) that it is practically impossible to determine just what is the individual action of the various elements in the Dunkley machine. Apparently then his testimony to the effect that the jets of water serve to tear the skin from the fruit amounts to nothing more than

an opinion on his part as to the manner of operation of the machine.

While witness Verhage states that the perforated pipes did the peeling of the fruit, he admits (XQ. 150) on cross-examination, that the operation of the machine is so rapid that it would be impossible to definitely state the action of the various elements, and he also admits (XQ. 153) that Dunkley's machine would be correctly described by stating that it was one in which brushes were provided for loosening and removing the skin and sprays of water for washing away the removed skins. The testimony of witness Wing is indefinite and contradictory. It is difficult to gather from her statements just what she regarded as the operation of the machine. At some places she states that the brushes were intended to take the paring off the fruit and at others that the jets performed this function (XQ. 49; RDQ. 50; RXQ. 54). However, it is apparent that this witness knew very little as to the structure of the machines and her testimony as to their mode of operation can be given little weight.

Taken as a whole, the testimony fails to clearly and definitely establish that Dunkley's machine will operate in accordance with the theory now advanced by him. There are not facts set forth from which the operation of his machine could be definitely determined and practically all of the testimony on this

point amounts to nothing more than conclusions on the part of the various witnesses.

It follows, therefore, from all that has been said that Dunkley has failed to show that his device will perform the operation of peeling fruit by means of jets of water. The reasons for this conclusion may be restated briefly. Dunkley's specification does not clearly describe any such action by the jets in his machine and nothing occurred during the early prosecution of his application to show that any such action was ever contemplated. The machine offered in evidence would apparently not operate in the manner now claimed, and the testimony that this machine, or that of the application would so act, amounts only to an expression of opinion by the witnesses, there being no established facts on which said testimony is based.

Under the circumstances of this case, it was incumbent upon Dunkley to show very clearly that his device would operate in accordance with the new theory adopted by him after the issue of the Beekhuis patent. He has failed to do this and it must, therefore, be held that the machine described in Dunkley's application does not contain means for directing peeling jets upon the fruit, and that he is not entitled to make the claims constituting the issue of this interference.

Priority of invention of the subject-matter in

issue is accordingly awarded to the senior party,
Hermanus A. Beekhuis.

Limit of appeal: December 29, 1910.

H. E. STAUFFER,
Examiner of Interferences.

December 9, 1910.

No. 2915.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CENTRAL CALIFORNIA CANNERIES CO.,

Appellant,

vs.

DUNKLEY COMPANY,

Appellee.

Brief of Appellee.

FRED L. CHAPPELL,
JOHN H. MILLER,
Counsel for Appellee.

Filed this.....day of March, A. D. 1917.

F. D. MONCKTON, Clerk.

By....., Deputy.

The James H. Barry Co., 1122 Mission St., San Francisco

Filed

MAR 17 1917

F. D. Monckton,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CENTRAL CALIFORNIA CAN-	}	In Equity No. 2915
NERIES COMPANY, et al.,		
<i>Defendants-Appellants,</i>		
vs.		
DUNKLEY COMPANY,		
<i>Plaintiff-Appellee.</i>		

BRIEF FOR PLAINTIFF-APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from the decision and decree of the District Court of the United States for the Northern District of California, Southern Division, holding United States Letters patent No. 1,104,175 of July 21, 1914, to be the property of plaintiff-appellee, to be a good and valid patent, and to have been infringed by defendants-appellants. An injunction and accounting was ordered as to Claims 1 to 6 inclusive, 14 to 16 inclusive, and 19 to 26 inclusive. The decree appears beginning at R. p. 700.

ASSIGNMENTS OF ERROR.

The assignments of error begin at R. p. 711 and are twenty-five in number. The first assignment is *general* as to error in granting an injunction. The second is *general* as to error in granting any relief. The third is *general* in not dismissing the bill.

The fourth assignment is *general* in alleging error in the court's finding or adjudging that the defendants had *infringed* the patent. The fifth assignment is to *infringement*, specifying each of the claims separately.

The sixth assignment is *general* as to adjudging the letters patent to be *good* and *valid* in law. The seventh is general as to the finding of *validity* as to *any* of the *claims*. The eighth is general as to validity except that it enumerates specifically all the claims involved.

The ninth assignment alleges generally that the court erred in the matter of *fact* in finding that Samuel J. Dunkley was the first, original or any inventor. The tenth assignment is the same as the ninth except that it enumerates the claims in detail. The eleventh assignment alleges peculiar error in that it said that the

“court erred in finding or adjudging that plaintiff had proved or established *beyond a reasonable doubt* the alleged date of the alleged inventing by the said Dunkley.”

The twelfth assignment is inconsequential, as it alleges that the court erred in not finding that one *Stewart L. Campbell* was the inventor.

The thirteenth assignment is a similar assignment as to one *Vernon* being the first inventor. Assignments fourteen and fifteen also relate particularly to *Vernon*.

The sixteenth assignment relates to error in not finding priority of invention by one *G. E. Grier*, as does also the seventeenth assignment. The eighteenth and nineteenth assignments are substantially continuations of the *Grier* assignments, under the name of *Pasadena Canning Co.* The twentieth assignment is a continuation of the *Grier* anticipation under the name of the *Eastside Canning Company*.

The twenty-first assignment relates to the matter of the plaintiff being in court with *unclean hands*, an entirely inconsequential assignment, as there is no evidence bearing on this proposition at all.

Assignments twenty-two and twenty-three allege error because a letter written to and a letter from one *Kennedy* were not considered in evidence.

Assignment twenty-four relates to the exclusion of a certain affidavit of *Robert I. Bentley* and to his answering questions relative thereto.

Assignment twenty-five is absolutely general, a catch-all, and gives no guide to any proposition that may need to be considered in this behalf.

THE DEFENSES.

The defenses for the defendants to be reviewed by this Court are purely matters of *fact*:

(1) That Samuel J. Dunkley was not the first and original inventor of the particular things recited in the claims enumerated.

(2) That the invention was produced by Stewart L. Campbell prior to the date of production thereof by the said Dunkley.

(3) That the invention was produced prior to Dunkley by C. J. Vernon.

(4) That the invention was produced prior to Dunkley by G. E. Grier of Pasadena.

It was substantially conceded in the court below that if Dunkley was the first inventor, the patent is good and valid and infringed by the structures made use of by the defendants. There is no evidence to meet the presumption of validity of the patent and the proof that defendants' machines respond to the claims and that there is infringement.

A review of the assignments of error seems clearly to indicate that none of the prior patents cited are relied upon other than the patents to Vernon and to Baker, *et al.*, as there are no assignments of error relative to any of them.

ARGUMENT.

We will, after pointing out specially pertinent and recent Supreme Court decisions, proceed *first* to the consideration of the patent in suit and the infringing structures, the evidence relative thereto appearing in plaintiff's *prima facie* case, unmodified by cross-examination and not in any way met by defendants' proofs.

Second, the defendants' main case will then be considered. As to this it appears that there are proofs showing (A) the use of a certain structure known as the Vernon structure, at Fresno and Los Angeles, the same being a use practically by the California Fruit Canners Association. The details of the structure appear in Vernon patent No. 784,527, of March 7, 1905 (R. p. 742), which was a modification of and addition to the Baker *et al.* patent No. 616,284 (R. p. 883). These structures were ineffective and were ruled as a matter of fact not to contain the Dunkley invention of the patent in suit. That invention of Dunkley's was installed later, superseding the earlier structures. The affidavit of Robert I. Bentley, which was excluded (see assignment of error No. 24), relates to this Vernon use, the affidavit and evidence being wholly incompetent.

There were also proofs offered (B) as to the Grier prior use at Pasadena, which proved to be subsequent in date to the date of invention of the patent in suit,

and it is as to this use that the inconsequential Kennedy letters relate which are referred to in assignments of error twenty-two and twenty-three.

Third, plaintiff's rebuttal testimony will be considered. The attack of defendants was met by the testimony of Samuel J. Dunkley, the inventor, confirmed and supported by Melville E. Dunkley and by the superintendent of the Dunkley Company, Harvey C. Schau. This showed that the Dunkley invention had been conceived of by Dunkley early in the year 1902 and a machine substantially completed and somewhat tested in the fall of that year, and put into actual operation in July, 1903. It is complained by the defendants that this is only shown by the oral evidence of three witnesses and that there are no documentary proofs. This is an absurd position for the defendants to take. The clear oral evidence of three witnesses should be sufficient. However, in place of any documents, a piece of *real* evidence, the framework of the identical machine itself, is produced and identified in court. A document would have to be a drawing or some description of it. The real thing itself is much the better.

Fourth, defendants' sur-rebuttal will be considered. Thereafter the defendants presented sur-rebuttal proof attacking Dunkley as the inventor and claiming that the invention of the patent was the invention of one Stewart L. Campbell, offering Brunker and Mapes

as witnesses to confirm Campbell's claim. Yet both Campbell and Brunker state that they were directed to proceed with the building of the machine by Dunkley, the inventor himself.

It is thus seen that the matters ruled upon in the trial were *purely matters of fact*, and the finding of the trial court we believe will be found to be at least supported by evidence and consequently "unassailable."

MATTERS OF FACT DECIDED BY COURT BELOW ARE
"UNASSAILABLE" HERE.

The decision below followed a trial in open court, and it is believed therefore that the findings of the court on these questions of fact "must be treated as unassailable." This is the effect of the very recent decision of the Supreme Court of the United States in

Adamson vs. Gilliland, decided Jan. 8, 1917,
reported in United States Supreme Court
Advance Opinions of February 15, 1917, at
pp. 169-170.

Further, the burden on the defendants in proving anticipation by prior use is to prove the facts beyond a reasonable doubt. See

The Barbed Wire Patent, 143 U. S., 275-293,
36 L. ed., 154.

FIRST: THE PATENT IN SUIT AND INFRINGEMENT.

The patent in suit appears at R. pp. 731-739. The defendants' devices were stipulated in and appear in the record as Exhibit A at R. p. 26, and Exhibits B-1 to B-8 at R. pp. 27-34, and Exhibit B at R. p. 35.

Plaintiff's *prima facie* case consists of the testimony of Melville E. Dunkley, R. pp. 61-93.

The description of the patent is very full and complete and is respectfully referred to for a full understanding of the details of the invention. There is no particular technical language, and no expert was necessary to explain its details.

To state the matter very briefly, the Dunkley machine for peeling peaches is a pioneer and a labor-saving device. By its use five men (R. pp. 66-67) working ten hours a day are able to peel 1800 bushels of peaches in a day (R. p. 65). Two of these men are necessary to properly manage the machine and three of the men have for their duty the matter of delivering peaches to the machine and taking care of them at the discharge end so far as that may be necessary.

While this work is done with great rapidity, it is done very perfectly indeed, as only the woolly part of the peel of the peach is removed, no part of the pulp is cut away. The fruit is consequently left full size, uninjured and in perfect condition, and is consequently not only more in bulk when it finally gets

into the can, but is of a higher grade because of its full size and perfect appearance and condition.

The advantages, then, of the invention are very great. It is rapid, it results in saving all of the pulp, all the food value, and it produces a superior product.

Considering briefly the invention as to detail, the patent drawing of the structure is at R. pp. 855-861. Figs. 1 and 1-A when placed end to end show a complete plan, and Figs. 2 and 2-A when placed end to end show a complete side elevation of the machine. The peaches are poured on to the hopper E¹, pass down the incline to the bottom thereof to the upwardly-moving forward end of the endless conveyor D, which picks them up in single transverse rows and layers and passes them into the lye tank B, the lye in which is heated by suitable coils. The peaches are retained upon the upper run of the conveyor D and carried beneath the surface of the hot caustic solution with which they are kept in contact for a period of something less than a minute and until the hot solution has entirely disintegrated the peel. The peaches are then carried by the conveyor out at the rear end of the lye tank and down the inclined chutes F leading to the peeling sprays and brushes. An endless conveyor brush H is made up of a series of brushes with the brush portions projecting outwardly on a belt, and serves to receive and carry the peaches forward very rapidly, owing to the comparatively large dimensions of the pulleys H² for this conveyor.

At each side of the conveyor,—see particularly Figs. 4, 5 and 6,—are disposed rotary brushes K K¹ which revolve up and away from the conveyor, and are disposed and arranged in the structure illustrated, to act upon very small peaches of about one and three-fourths inches in diameter, the much larger path of the peach being indicated by dotted lines in Fig. 5. At each side of the brush conveyor H and beneath the rotary brushes are disposed longitudinal pipes G, G, and between the two brushes and directly above the conveyor brush is also disposed a similar pipe G. These all are perforated at g, as indicated more particularly in Figs. 3, 4, 5 and 6, and deliver on to the passing peaches. There are in practice about 144 of these spray holes in the comparatively short length of the conveyor, and they deliver the sprays under strong pressure to the peaches which are passed quickly between the same. *The spray pipes G, it will be noted, extend somewhat beyond the rotary brushes and act upon the peaches after they have passed beyond the brushes to entirely and completely remove the peel from the same.* The peaches are discharged into a tank at the tail end of the machine or into any other receptacle which may be provided. The brushes are at once soaked and become very soft and non-abrading. The result is that the peel of the peach is first softened by hot alkali of sufficient strength to disintegrate it, the same is delivered *immediately* to the peeling part of the machine where the same are

treated to strong sprays, the peach being rotated in cork-screw fashion to present all surfaces of the same as it is tumbled forward through the very active sprays delivered against the same at pressures varying from forty to one hundred pounds to the square inch. The high speed and perfect work above referred to are the inevitable result.

The witness Dunkley defines and explains the structure, Defendants' machine, Exhibit A, beginning at R. p. 67, in response to inquiry by the Court, as follows:

"A. The peaches are fed into the hopper marked 1, are fed on to the elevator marked 1, and in through the hopper marked 2; I was not allowed to see the inside of that, and Mr. White who accompanied me, said that it was a structure along the lines of all of them used; it appeared to be the Plummer pipe, having bevelled vanes.

"Q. This is the hopper?

"A. This is the hopper with a steamhood over there to carry away the surplus fumes; the peaches are evidently carried through by vanes—

"Q. What do you mean by vanes?

"A. That is supposed to show the hinges on top; this top would raise up, a sort of archimedial screw.

"Q. This is inclosed?

"A. Yes. The bottom is shown pitched here to take care of the drainage and cleaning; this is supposed to be a thermostat which regulates the steam supply to keep the contents at a uniform temperature, and this box, marked 4, is an auxiliary heating box, in which water and caustic soda was placed so that it could be introduced

into this tank without cooling the contents down; as I say, the method of carrying the peaches through this scalding, I was unable to see, but surmised that it was carried on a shaft with a number of vanes which with the archimedial screw motion carried the peaches forward and ejected them here into the drum marked 5. This consisted of a cylinder—if I may read this, the notes that I took at the time—mounted on four trunnion rollers, which rollers are carried by a steel frame and are placed inside of a metal drain-pan, with high metal sides to act as splash guards. The guards are not shown on here; the guards were fastened to this pan under here and came up nearly to the top of the drum. The cylinder was made of a sheet-steel, was approximately 11 feet 10 inches long, and about 23 inches in diameter, the metal being corrugated or fluted; at the bottom of each flute were $\frac{1}{2}$ inch holes, $1\frac{3}{8}$ inches from center to center, extending the full length of the cylinder. These are shown here by the dots. The flutes or corrugations were rounded at the inside apex and sharp cornered at the outside. That is hard to show here, but the inside of this that comes in contact with the fruit was more or less rounded, while the outside was bent sharp at about, I think it is, a little less than right angles. The holes referred to were punched so that the sharp bend, or valley of the flute, bisected each hole. This cylinder was revolvable, as at near both ends was a circular track which rested upon the pulleys attached to the frame work, and at the feed end attached to this track was a rim-sprocket for driving. This is shown here. The driving means were inside this drum; they were not shown here, but it lays in a cradle composed of four rim pulleys, and revolves on these tracks here. Extending through-

out the length of the cylinder and approximately equi-distant from all of its sides was a 2-inch pipe fitted with a series of Oakland Sprays, placed approximately every 8 inches on this pipe. The outside of it was shown right at this point; that extended throughout. This you see, is about the center of this drum; the drum would extend to about down here, and this pipe extended practically the entire length of the drum, and every 8 inches—you see the pipe in this view here—that goes right back through the drum, and about every 8 inches was an Oakland Spray so arranged that it threw the spray downwardly and a little to one side; evidently as the cylinder revolved that carried the peaches more or less away from the center and kept them a little to one side.

“Q. What is an Oakland Spray?

“A. An Oakland Spray is a spray with a nozzle about $\frac{1}{4}$ inch, and has a deflecting blade.

“Q. It was shown here on the former case?

“A. Yes; it makes a fan-shaped jet.

“Q. Something like the character of the appliance used on these more modern street water-wagons?

“A. Yes; it throws a flat spray, fan-shaped. The discharge end of the cylinder is 27 inches above the floor, and the feed end is about 8 inches higher, giving approximately 8 inches pitch for practically 12 feet—11 feet 10 inches; the pitch of this is so arranged that as the cylinder revolves the peaches travel through there on a zig-zag path; they are carried up, and then as they get far enough they tumble off of the projection or flute on the inside which carries them, and they slide down and at the same time slide forward owing to the pitch of the cylinder. The fruit is discharged from this cylinder upon a moving conveyor-table composed of two chains—

“Q. This is the conveyor-table?

"A. Yes. That is composed of two chains with copper or brass—I think they were copper—flights, which made a practically solid table and allowed it to turn as it went over the pulleys. This table was inclosed in a model housing or box, and arranged above the table, and inside of the housing was a series of perforated pipes with the perforations pointing downwardly toward the table, and so arranged that they could spray the fruit as it passed along the table, with a jet of either steam or water. At the end of the discharge end of the table was a semi-bucket type metal elevator to receive the fruit and elevate it to an Anderson-Barngrover peeled peach grader. At the spot where the peaches tumble from the horizontal brass top conveyor—that is shown here—table, on to the elevator were arranged four pipes having an enlarged head sprinkler on each for spraying the peaches as they tumbled down and on to the elevator to give them a final cooling and washing; that is given on this drawing as No. 8.

"Q. And the elevator is No. 9?

"A. No. 9. The face of the sprinkler heads was filled with a multitude of fine holes, approximately one thirty-second of an inch in diameter; the face of this sprinkler I should say was about 4 inches.

"Q. These heads are so directed as to spray not only as they come out of the drum but as they go up the elevator?

"A. Yes, as I understand the use of these steam hoses, the practice in some places is to use steam and some places hot water; I have seen both used.

"Q. You mean for peeling purposes?

"A. No, for blanching and washing. Another matter, which I don't know as it has any bearing on this case, was the machine which stood unattached near this machine and which could be

readily set in to this cylinder, was a Thomas Monitor Tomato-scalder and Peeling Machine; that is a standard machine."

The witness Dunkley defines and compares the operation of the two machines at R. pp. 72 and 73, as follows:

"The operation of the two machines, according to my opinion is very similar. In the machine of S. J. Dunkley the peaches are turned as they are acted upon by the sprays, by the two brushes K and K, and more or less by the—I think I have these numbers right—by the conveyor brush; in the machine having the cylinder practically the same action takes place, and the peaches follow nearly the same path as they go through the machine; in the Dunkley machine the peaches will go through in a zig-zag, something like that (illustrating); in the other machine the peaches will go through in a path more or less like that (illustrating); it may be somewhat exaggerated.

"They will be carried up and slide down; at the same time they will be acted upon more or less by the brushing action of the interior of the cylinder which in comparison with this is perhaps the same as an external gear and internal gear in its action and at the same time they will be so turned that the jets of water will be able to cover the surface of all the individual specimens."

The witness explains the operation of Defendants' Machine Exhibit B, beginning at the bottom of R. p. 76:

"The sketch given in the stipulation" [referring to Exhibit B in conjunction with the photographs

Exhibits B-1 to B-8, and their operation is compared further on], "shows a little better idea I believe than the photograph of the action of the machine, and if I am not mistaken I believe that is a similar design to one of the Beekhuis patents; if properly hooked up with sprays and proper operation, I see no reason why it should not peel peaches; to what extent would be hard to say, or as to capacity.

"From the photographs, the peaches are first treated in a so-called grasshopper scalding, which is shown in No. 8, and this is practically the same type of scalding or peach-treating machine that was shown in the other case; in this peaches are dumped in bulk into the tank part, into this part here (illustrating); it is not covered over in this machine; this usually contains a solution of caustic soda and either perforated or radiating steam pipes to keep it at a high temperature and the peaches after going into here are carried by an archimedial screw up through the conveyor and dropped on to the shaker-table which is shown in the sketch."

This was developed and confirmed on cross-examination and no testimony was offered by the defense to in any way modify or vary this proof as to the precise identity and principle of the defendants' machines with that of the patent in suit.

The claims in detail are readily understood and will not need to be reviewed in detail here. The finding of the court is quite conclusive as to the comparison, there seeming to be no question as to the infringement in the event that the patent was held to be good and valid.

As typical of the claims in issue we quote claims 19 and 21, viz.:

"19. In an apparatus for treating fruit, such as peaches, means for removing previously disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position of the fruit on said support, and means for directing peeling water jets upon said fruit.

"21. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit as it advances."

SECOND: DEFENDANTS' MAIN CASE.

Defendants' case comprises (A) the Vernon anticipation and (B) the Grier anticipation.

(A). As to the Vernon anticipation, the following witnesses were sworn:

Baker (R. p. 100) identifies himself as one of the inventors of the Baker, Chalker, *et al.* patent No. 616,284, R. pp. 883-6, Defendants' Exhibit F. The Baker machine was installed under the direction and authority of C. J. Vernon, whose machine appears in Plaintiff's Exhibit 11, R. pp. 742-4, where the brush section is indicated as a "brushing machine 17" (R. p. 744, line 3) and no sprays being illustrated in the patent. The machine Baker refers to is the machine of the Baker patent and made in accordance therewith, where it will be observed that there is a

conveyor (R. p. 883) with flights *e e* therein moving *slowly* over small pulleys F and carrying the fruit between brushes which rotate in contact with the fruit (see Fig. 3) and brush down against the same. The fruit treated was oranges and a little water was drizzled on to the same from pipe I from the tank N, as there illustrated. It appears that there was substantially never any pressure on the water that was delivered to this brushing machine at the Fresno plant.

Baker's testimony as to details other than that his machine is made in accordance with the patent is very indefinite and uncertain and does not show a machine operating like the Dunkley.

Way (R. p. 124) was called to testify about this Vernon machine which embodied the Baker brush structure. His testimony is wholly unsatisfactory as to any details. His knowledge of the business was not sufficient to give him an understanding so that he could testify intelligently. There is no question that Vernon had a machine of some kind at Fresno as early as the peach peeling season of 1902, but it was not a machine working on the principle of Dunkley, and the lower court so found.

Cobbey (R. p. 146) was another witness who testified about the Vernon machine with the Baker *et al.* brush device. He was mixed up in his dates. His testimony is wholly unsatisfactory in details and does not show the existence of a spray machine, but merely

of a brushing machine with some water drizzled on to the fruit to soften it so it could be brushed.

Combs (R. p. 170) is of like character to Cobbey's testimony, as is also the testimony of *Lushbaugh* (R. p. 181); also *Hickey* (R. p. 197).

Robert I. Bentley (R. p. 215), manager of the California Fruit Cannery Association, was called, and his affidavit made in the Public Use Proceedings was read to him, which affidavit was objected to as immaterial, irrelevant and incompetent (R. p. 221), and the inquiry as to the affidavit and the affidavit itself were ruled to be not only immaterial but incompetent. A license from the Dunkley Company was shown, which merely shows the adverse interest of the witness.

There was an attempt on redirect examination to introduce the Kennedy correspondence, the witness denying having received the Kennedy letter, and the court ruled (R. p. 232) "Manifestly, that letter would not be admissible as against this plaintiff; that is mere hearsay."

The proofs therefore did not establish the use of any machine comparable with the Dunkley until 1904 at the earliest, which was long after Dunkley had developed his invention.

The witness *E. H. Kennedy* (R. p. 393) was called. He testified as to hearsay on the Grier machine which will be adverted to later on.

It was attempted to show by Kennedy that the

Vernon machines were successfully operated in 1903 at Los Angeles (R. p. 394-5). The witness' attention was directed to his old letter book (R. p. 400) and he recollected the use of acid to correct the lye, saying at R. p. 401:

"Q. But there was a formula with some hydrochloric acid or something of that kind to neutralize the alkali on the peaches?

"A. There was something, yes.

"Q. You used that, didn't you?

"A. Yes, it was used there; I don't know what it was.

"Q. That corrected any discoloration of the peaches due to the lye, I suppose?

"A. I do not think so; I think it probably assisted, but I do not think it would remove it."

Lambert (R. p. 412) was called to confirm the Vernon use at Fresno and did not prove to be even cumulative as to what had been already stated.

This testimony is wiped out by the documentary proofs, Defendants' Exhibit F (*Baker et al.* patent), which shows what was incorporated in the Vernon machine, and is not comparable with the structures made use of by Dunkley, and by Vernon's own patent, Plaintiff's Exhibit No. 11, R. p. 742, where the structure is referred to at p. 744 as a brushing machine 17. Vernon's machine amounts to a scalding and brushing machine and was superseded by the machine of Beekhuis. Beekhuis was the defeated party in the interference in the United States Patent Office with Dunk-

ley. His machine is illustrated at R. p. 748-753, Defendants' Exhibit A, his application having been filed May 25, 1904, and his invention coming long after Dunkley's invention.

Plaintiff's witness *Fontana* (R. p. 470) pointed out that he assumed charge of the factory at Fresno in February, 1904, and that he found an arrangement of devices which would not give water pressure because he found a $1\frac{3}{4}$ -inch service cock running into a 2-inch line (R. p. 472), which means that the pressure obtained would be of no consequence. He was familiar with Beekhuis' experiments in 1903 at Hanford, and saw the same explained to Mr. Monte (R. p. 473).

The witness testified that he found a pump there at Fresno taking care of the 2-inch line (R. p. 474) and says:

"they were not getting enough water; when I put in the 4-inch line, I just put the pump up for the peeling system, and nothing else; instead of to suck the water from the main, it was to force it through the sprays."

This witness was not cross-examined.

Defendants' witness *Dawson*, assistant general superintendant of the California Fruit Cannery Association since its organization in 1899 (R. p. 632), was familiar with the plant of the company at Fresno in 1902-3, it being a Vernon machine (R. p. 633). He testified that two or three such machines were in-

stalled in 1903 in the canneries of the company, saying "I don't know what became of them" (R. p. 633). He says that they were succeeded by "what were called the Beekhuis machine" (R. p. 634) and that the Beekhuis machines are still in use. In response to inquiry, "Why were the Beekhuis machines substituted for the Vernon, if you know?" he said:

"We were not satisfied with the Vernon machine; it would not do the work just as we would like to have it done."

The court was justified in ruling that the Vernon machine was not the Dunkley machine and did not anticipate it.

(B) AS TO THE GRIER ALLEGED ANTICIPATION:

Finley (R. p. 235) testified in effect that in or about April or May, 1903, he began the construction of some tanks for G. E. Grier of Pasadena, for use at the plant of the Pasadena Canning Company and at the Eastside Canning Company in Los Angeles. He testified that a scalding machine was installed and sprays were introduced. A structure appears to have been produced like the photographs marked B-1 to B-8 inclusive. Witness said they were finished in July, 1903; thinks they were put in *public* use but there is no evidence to that effect, the contrary seeming to be the fact because there was a sign put up "Keep out" (R. p. 251). The machine was first tested on July

28th or 29th (See Grier's testimony, R. 311) and was not made use of until August, 1903.

Lusby (R. p. 275) was a bookkeeper for Grier and his information would only support some date in 1903 or later for the Grier machine. He showed an item with the Eastside Canning Company for labor, etc., July 30, 1903, for 4 Convey Vats (R. p. 297). Otherwise the items are of no consequence and that item is not very definite as to a peach peeling machine, yet the testimony goes to establish that Grier did something in the late summer of 1903.

Grier testified as to his own endeavors beginning at R. p. 282, a portion being interposed in the *Lusby* testimony, where he identified some books as having been in his possession. His real testimony begins where he is recalled, at R. p. 301. He testified to a matter of dipping peaches in lye, as early as 1891, and thereafter washing the peaches. In 1902 he formed a partnership with Mr. Taylor (R. p. 304) and leased the Pasadena Packing Co. plant in Pasadena. He says, R. p. 304:

"about the middle of August or about that time, I was down to see Mr. Taylor, with my partner, and he told me that it was all foolishness to try to continue with the peeling of whole peaches; he said you could peel halves after pitting just as well, and he demonstrated it to me in the factory and I immediately went back home and changed the proposition from a whole peach to a half peach."

He says, R. p. 305:

"I conceived the idea right then of building a machine to do the work more rapidly, and the machine that I built in 1903 was the result of that conception."

He states that in April he employed Finley to begin building the machines. He fixes the time of completion of the work on the machine built for the Eastside Canning Co. as early in August, at which time a pump was supplied for increasing the water pressure on the jets. This occurred, he said, "early in August, I think the 3rd" (R. 312). All of which dates are *later* than that absolutely proved by Dunkley.

Mr. Grier's cross examination indicates certainly that he had no particular conception in 1902. He had heard of Beekhuis (R. p. 336) and knew of Beekhuis' machine. Grier discontinued his particular machine when Dunkley served notice upon him.

C. L. Kennedy (R. p. 349) was called to confirm Grier but of course could not carry Grier's date back of the date established by Grier.

Herman (R. p. 354) was called to support Grier's statements, which he did very ineffectively.

Mrs. Grier (R. p. 360) testified as to what Grier was doing and as to discussions, but nothing is claimed to have been done until the spring of 1903.

Waterhouse (R. p. 372) was called to support Grier's statements. *Taylor* (R. p. 376) was also called to support Grier. *Miss Mayes* (R. p. 385)

was called to state her acquaintance with Grier and what she saw, all of which did not carry Grier's date back of August, 1903. The same is true of *Stetson* (R. p. 388) and of *Sanborn* (R. p. 391).

E. H. Kennedy (R. p. 393) was called to support Grier's statements and his support was *purely hearsay*, consisting of a letter of August 5, 1903, which he wrote to the California Fruit Cannery Association. It contains a hearsay statement and was refused admission and consideration by the court. The letter refused appears at R. p. 398-399, the ruling of the court being at R. p. 398:

"It is not competent for showing that he was using it; he has already testified to it; the objection is sustained."

The expression that "he was using it" refers to the use by Grier. It appears that the witness had been instructed in 1913 to investigate certain facts and his report thereon would not indicate that the matter of this letter of August 5, 1903, was of any particular consequence in that behalf. The letter was properly excluded.

Specifically, it was unnecessary to offer any evidence regarding Grier's work, so far as the defendants were concerned, because Dunkley's invention and reduction to practice entirely and completely anticipate the Grier dates. In view, however, of Grier's confession to an acquaintance with the Beekhuis ma-

chine, we are constrained to believe that his inspiration came from Beekhuis, and that really the development was somewhat later, for the striking similarity between his machine and that of Beekhuis would indicate that either Beekhuis derived something from his acquaintance with Grier's doings or Grier from his acquaintance with Beekhuis. We presume Grier got it from Beekhuis. However, it was wholly unnecessary for plaintiff to dig into the matter or develop it in any way because it was too late to have any effect upon Dunkley's invention. The matter could only be of academic interest and investigations of this kind involving thousands of miles of travel are, to say the least, not inexpensive.

THIRD: PLAINTIFF'S REBUTTAL TESTIMONY.

Melville E. Dunkley's testimony begins at R. p. 413. He points out that his father, S. J. Dunkley, explained and disclosed matters pertaining to the invention to him early in 1902, the lye proposition not appealing to him (R. p. 415). He identifies the time as following a year when some additions to the factory were made. Mr. Samuel J. Dunkley, his father, the inventor, was excluded from the room while he was testifying. He refers to the frame of the machine standing in the room and said (R. p. 416):

"we started in getting ready to put that machine together in the early part of 1902. The season,

of course was very busy and I was back and forth from Hartford so that the machine was not finished until toward the late fall of 1902; we got perhaps a few bushels of peaches through there using an ordinary galvanized tub and a basket of some kind to scald a few bushels of peaches in order to get work enough done to see whether the matter was going to be practicable or not. We, however, were very well satisfied with the results. * * * That was built and set up with this first experimental machine at South Haven in the early summer of 1903. Later that year there was another machine built and put in operation."

He explained the development of the machine from then on and the shipment of a machine to Chico, California, saying specifically at R. p. 418:

"The first complete machine including the scalding and the peeler was operated at South Haven in 1903. The scalding was delivered in April I believe, of 1903, and the machine was set up at South Haven as soon after that as we could get to it, and we started practical operations on that line as soon as the Georgia peaches came into the market at Chicago, which is usually early in July."

"Q. Then you would fix the date for the first successful operation as when?"

"A. *In July, 1903, for the commercial operation of the machine.*"

The brush part and the spray parts were successfully operated in the *fall of 1902* (R. p. 418). The history of the business from then on was developed by the witness. A protracted cross examination did not change this testimony but only confirmed it.

Plaintiff also offered the testimony of *Samuel J. Dunkley*, the inventor, in rebuttal (R. p. 475). Mr. Dunkley is an inventor of many fruit handling and canning devices, having taken a large number of patents, as appears in Plaintiff's Exhibit 9, Dunkley Canning Patents. He states the circumstances, so far as the invention of the claims in suit is concerned. He pointed out his own history beginning in the late '80's, how he built a factory at Kalamazoo and a plant at South Haven, and developed a business where he was using close to a million cans per year. He was bothered about peeling, and the peaches used to spoil from Saturday over Sunday to Monday, and he says, R. p. 478:

"in September, 1901, it occurred to me that caustic soda might possibly be used in peeling peaches."

He found that caustic soda would make the skin soft. He says at R. p. 479:

"*In August, 1902*, I told my son about the matter and we made some experiments and concluded it would be worth while to build a little experimenting machine and try it out; so I gave him the instructions and then the machine was finished and hooked up and we tried it; I put up some canned goods, a few cases and the next spring was satisfied that it was all right and then we went ahead and built the apparatus which is practically the same as at the present time."

"*In July, 1903*, the apparatus was completed and tried out—*about July 15*, that is, when the southern peaches got up."

He says the machine was kept there in the factory and he identified the old frame. It is offered in evidence at R. p. 480, as Plaintiff's Exhibit 10.

The extent to which Mr. Dunkley gave attention to details was pointed out. The complete success of the machine was shown. Cross examination did not modify his statements. It developed that there was an interference in the Patent Office with Beekhuis and that in that interference it was clearly stated that the complete invention was installed in July, 1903, but it did not tell about the incomplete machine set up sufficiently for a try out in the fall of 1902. Because that was not done the defendants complain that Dunkley has changed his testimony, which is not the fact. The lower court found as a fact that there was no essential difference between the testimony given by the Dunkleys in the Patent Office and that given by them in the case at bar (R. 697).

The testimony of the Dunkleys is confirmed by the testimony of *Harvey C. Schau* (R. p. 513). He was in the employ of the Dunkley Company at different times from 1898 to 1908, and from 1902 to 1908, except for a little while in the winter of 1902, he worked for them continuously. He is familiar with the method employed in peeling peaches and says at R. p. 514:

"Until 1903 they were peeled by hand or by a little hand machine; beginning in 1903 they commenced to use what we called a lye process; be-

ginning in 1904 the peaches were *all* peeled by the lye process."

Considering experiments he said, R. p. 514:

"I saw an experiment with some peaches in a wire wastepaper basket in July, 1902."

"At South Haven, M. E. Dunkley was the man who did the experimenting."

"I left South Haven in the first of August, 1902, and went to Hartford, and I was there until the 1st of November; the first of November I came back to South Haven, and there was installed in the basement of the north wing some machines that I had never seen before and one of these was as I was afterwards informed—was a machine for peeling peaches.

"Q. What date was that?

"A. The 1st day of November, 1902."

He fixes the time precisely by pay day and other circumstances. He knew that the machine was still in existence and identified the framework of Plaintiff's Exhibit No. 10 as that machine.

He next observed the process early in the next summer (R. p. 515), saying he believed he observed the machine in operation "either the day before or the day after the 4th of July," 1903. His opportunity for observing in 1903 is explained at R. p. 516:

"In 1903 I had charge of what we call the machine-room, or it was the Automatic Vacuum Canning Company machine, we call them vacuum machines and double seamers for making the

closure on the can; that room was located at the extreme west end of the main room, and the line extended east from there; these peeling-machines were at the extreme east end of the room."

The peach machines could be seen from the place of his employment.

Cross examination did not in any way modify his testimony, but only confirmed it. The machine is identified completely.

This rebuttal testimony, therefore, in view of the testimony explaining the Vernon machine, shows conclusively that Dunkley was prior in date of invention to either the Vernon or the Grier machine.

FOURTH: DEFENDANTS' SUR-REBUTTAL.

CAMPBELL DEFENSE.

The defendants were in desperation and were then forced to play their last card. The defendants' sur-rebuttal testimony consists of the testimony of Stewart L. Campbell, beginning at R. p. 523 and closing at R. p. 549; Brunker, R. p. 598, cross at R. p. 604-632; and Mapes, R. p. 636-651, supposed to support Campbell.

Campbell's testimony is most remarkable. Campbell was an employee of Dunkley (at \$60.00 per month and later raised) from about the first of December, 1902, to December, 1904. He testified (R. p. 523-4) that he had had no previous experience with canning machinery but made a peeling-table

in July or August, 1903, which dates were kept in an incomplete memorandum which he referred to as a diary book because, forsooth, it was marked diary on the outside. He says in response to question (R. p. 528) :

“Q. You have referred to a lye machine; please state the circumstances under which that machine was made and what it was and when it was made.

“A. Well, they had to have a lye machine to lye the peaches for the peeler and about August, 1903, the first experimenting with the lyeing of the peaches was made, and *then I conceived the peeler*—they wanted a lye machine for lyeing the peaches; *Mr. S. J. Dunkley gave me the order to construct a lye machine* so I went to work and made a drawing of the tank after I had figured out the way I wanted it, I made a drawing of the *tank* and handed it to him to have the tank made of boiler-iron, and he gave the order at Kalamazoo, either gave it or sent it to Kalamazoo.”

He says (R. p. 528) :

“A. I can check it up from the entries I have got here of the material for it.”

No bills were produced or anything of that kind.

After the recess until 2 P. M. (R. p. 525) counsel for defense *resumed* the examination :

“Q. This morning you mentioned a peach peeling-machine constructed at the Dunkley factory. I request that you give the history of that

machine from the beginning to the end, if you know the same?

"A. In 1903 *Mr. Dunkley*, in I think about August, along in August, *told me that he wanted me to build a peeling-machine for peeling peaches; that he had a man making experiments on the lye strength of it and so forth, as to how to take the peeling off the peach, and he wanted me to construct the machine, and I was to see him and get the data on the lye, what was required and go ahead and build the machine; that was while I was working on this peach-table, peach peeling-table.* After I got through, I went over the next day or a day or so afterwards to Mr. Bruncker, who was the one that was *making the test on the lye; it was in the glass room attached to the main canning room, and he showed me what he had done with the lye and gave me an estimate of the time that they ought to be in the lye and the strength of the lye; he was using a hand brush and water after putting them through the lye, using the hand brush and water and rubbing the peeling off, and so from that work on the table I was figuring out just how to go to work at it, to construct it, and I think it was on the 9th, I am not certain, that it struck me about how to tackle it.*"

And the Court inquires (R. p. 530):

"Q. You had not been given any ideas at all by Mr. Dunkley?

"A. No, no ideas at all whatever, and this idea of using the circular brushes and the running belt for the brush, is what I decided on to try out; so I told Mr. Dunkley what I figured on and made a sketch of it, I drew a sketch of it and showed him and he thought it was feasible and I should go to work and go ahead with it; etc."

He testified about the sprocket chain and also how he had made a test with *Mr. Bruncker* and *no one else present* (R. p. 532-3).

The witness identified Plaintiff's Exhibit No. 10, saying (R. p. 535):

"A. That looks like the frame of the original model."

then, after examining it, said (R. p. 535):

"A. That is the framework and the pulley of the original machine and boxes; the brushes and drive wheels and gear or friction are not there."

This testimony is extraordinary, as it shows that Mr. Dunkley, the inventor, was the inspiring cause. Mr. Campbell, on cross examination, *confessed* (?) to being the inventor of all the structures which had been patented in Dunkley's name, although he had never had any experience whatsoever in the canning business up to that time and Dunkley had been at work at it all his life. The Court during cross-examination asked Mr. Campbell (R. p. 562):

"Q. How do you account for his" [referring to Dunkley] "just simply saying, ' * * * you go to work and build it,' without giving you any suggestion?"

"A. I did not attempt to account for it any more than he" [Dunkley] "thought I was pretty handy."

This would be a very strange way to account for

the production of such a machine. Machines of such novel character are not produced so easily. Mr. Campbell gives a strange explanation of his quitting the employment of the Dunkley Company (R. p. 564), stating that he wished money and not stock and that although the offer was gratuitous, according to his own story, he was much insulted.

Campbell's trip to Boston, referred to at R. p. 572, had no connection with the peach peeler business so far as his testimony developed. It appears that Campbell referred to Bruncker and yet at R. p. 588, he says:

"Q. Did Mr. Bruncker make any claim that he had invented anything to you?

"A. No; just the reverse; he told me that he knew nothing about machinery."

At R. p. 589:

"Q. What information was it he imparted to you, as you say, according to your instructions from Mr. Dunkley?

"A. I told him Mr. Dunkley had told me to work, test this lye out there in the peach business when I went to him; I also told him Mr. Dunkley sent me there to get this data at the time.

"THE COURT—Q. What data was it exactly that Mr. Dunkley sent you to Bruncker to get?

"A. It was data in regard to the experiment that he made on the handwork of the peach-peeling; he did the experimenting there with hand, to get the strength, and time, and so forth; I remember distinctly him telling me that these peach-

es had to be kept separated in the lye, because the spots where they touched together they were not liable to be properly lyed, and the peeling would stick on the peach; that is the reason why I separated them in running them through the lye-tank; I kept them so that they would separate as much as possible and still do it with speed."

Campbell having testified as to the friction gear, the Court examined him at R. p. 593-4, and he was unable to identify and explain how the friction gear was used on Plaintiff's Exhibit No. 10. The witness's attention was called to the friction gear in Fig. IV of one of Dunkley's patents, namely patent No. 805,844. The witness recalled no such friction gear.

The witness confessed to receiving from defendants \$500 and expenses for the work he did in their behalf in connection with this suit.

The testimony of Campbell was given in open court. Not only was that testimony carefully weighed, but his appearance, demeanor and mode of testifying were noted by the trial Judge. In fact the Judge personally took part in the examination and propounded questions to Campbell, and announced at the trial that Campbell's testimony was too improbable for him "to give it any credence" (R. 690). And after submission of the case the court again considered the evidence and said:

"I indicated at the trial, and my mind has been only confirmed in that view by my review of the evidence, that I could not extend the limits of

my credulity sufficiently to put credence in the testimony of Campbell. That he worked for the plaintiff at or about the time that he claims, there is no question, but that the claim he puts forth as to what he did in the premises, and the time it was done, is entirely beyond my ability to believe."

Brunker (R. p. 598) was called as a witness and he also told an improbable story indicating that he had nothing that showed that Dunkley was not the inventor or that Campbell was the inventor of the machine of the patent in suit. He was in the employ of the Dunkley Company a very brief time. He says at R. p. 600:

"He" [Dunkley] "said, 'It is going to work all right, we will have to get a machine for that, for what you are doing with your hand.' * * * 'we will get Stewart to build that.' That was Campbell, he was superintendent; and he says, 'You and Campbell get together and you show him what you want done and he will make a machine to do it.' So the next day Campbell came in to me and told me that Mr. Dunkley had said that he was to build a machine."

thus showing that S. J. Dunkley was the moving cause in each and every instance.

Witness was surprised at the date of the letter indicating that he was not at South Haven at as early a date as he testified (R. p. 610), the letter appearing at R. p. 612. *Brunker* testifies as to a friction gear, but his recollection is not confirmed by anything.

This is very weak stuff which is put up to anticipate a valuable patent. It appears from defendants' own evidence that Dunkley was the moving cause in each instance.

The testimony of Mapes (beginning at R. p. 636) is that of a mere machinist who ran a shop at South Haven. He had at one time attempted to appropriate a cherry pitting machine from the Dunkley Company. He kept a memorandum of work done for various concerns, among which are pulleys for a peach washer or something of that kind that were furnished to the Dunkley Company in 1903. His testimony does not negative anything that happened in 1902 and does not support the testimony of either Campbell or Brunker. Such uncertain testimony should not be regarded in a court of justice as anticipating or wiping out valuable rights which have cost thousands of dollars and are the result of long years of experience and the expenditure of a great deal of energy and time.

THE DECISION OF THE COURT BELOW.

We submit that the ruling of the Court below, when this testimony is considered in detail, is entirely proper and in fact could not well have been otherwise, when the rules of evidence in such cases are considered. The Court in its opinion (R. p. 696) points out that the Beekhuis matter was wiped out because Beekhuis was in interference with Dunkley in the Patent Office,

and the Court of Appeals of the District of Columbia decided in Dunkley's favor. Recently there has been a decision in Dunkley's favor awarding to him the process involved.

The Court says (R. p. 697) :

"As to the *Vernon* device, it had been in use in Fresno as early as 1902 or 1903. I am unable to hold that that device was an anticipation in its essential characteristics. It operated upon a *fundamentally different principle*. That was an adaptation to the purposes for which the plaintiff's device was used, that of peeling peaches, of a device by *Baker and another* for scouring oranges for the market; it had a *system of revolving brushes*, and it used a *saturation or douche of water for the purpose of softening* the brushes and of washing the fruit; but the essential *operative principle there was the brushes*. They were for the purpose of scrubbing and *washing the hard outer surface* of the skin of the *orange* and of freeing it from mould and other detrimental substances which interfered with its marketability, and the essential principle was the operation of the brushes. The *water* was used, as I have suggested, only for a *saturating and washing purpose*."

The Court adverts to the fact that the *Vernon* patent does not point out the features. The Judge concludes as to *Vernon* :

" * * * *I am therefore unable to hold that the Vernon device, which was subsequently patented—I think in 1905—can be regarded as an anticipation of the device or the conception embodied in the plaintiff's patent.*"

As to *Grier*, the Court says that it is a close question to determine who had the first conception. He says (R. p. 699) :

“Grier never has applied for a patent, I believe, and the evidence tends to show that *upon its coming to his knowledge that it infringed the device of plaintiff, he abandoned that particular device and adopted another.*”

He then says that the *main* reliance in the evidence is upon the testimony of *Campbell* and that of *Brunker*, and the Court reaches the conclusion (R. p. 699) :

“In its essential substance I regard the *evidence on behalf of the plaintiff as making a case substantially free from doubt*, that the plaintiff’s assignor conceived this device and put it to use at a time *at least a year prior to the time claimed by Campbell*; and as this is a question on which the case turns, the result is that the decree must go for the plaintiff.”

This we earnestly urge is abundantly supported by the testimony which we have thus briefly reviewed.

THE LAW.

Testimony of anticipation, as we pointed out in the beginning of this argument, must be beyond a reasonable doubt. See

The Barbed Wire Patent, 143 U. S., 275, 36 L. ed., 154.

We are very confident at this juncture that the law is settled by the United States Supreme Court, that a finding of fact determined in open court trial in a district court must be, to use the language of that Court, "treated as unassailable."

The attention of the Court is most respectfully directed to the recent decision of the United States Supreme Court in *Adamson vs. Gilliland*, decided January 8th, 1917, reported in the United States Supreme Court Advance Opinions of February 15, 1917, at p. 169-170.

This decision, it is believed, is very pertinent and shows the law applicable to findings of fact by the district court in a case like the case at bar. The following language of the United States Supreme Court, appearing at p. 170, is here quoted for convenience:

"There is no doubt that the defendant had castings made. The essential question is the time when they first were made. We shall not discuss the evidence of those concerned in the making beyond recurring to the impression that the witnesses made upon the district judge, and mentioning that a dray ticket relied upon as fixing that date appears to have been open to grave suspicion from its character, marking, and other details. Considering that a patent has been granted to the plaintiff, the case is preeminently one for the application of a practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' *Davis v. Schwartz*,

155 U. S., 631, 636, 39 L. Ed., 289, 291, 15 Sup. Ct. Rep., 237. The reasons for requiring the defendant to prove his case beyond a reasonable doubt are stated in the case of *Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.)*, 143 U. S., 275, 284, 36 L. Ed., 154, 158, 12 Sup. Ct. Rep., 443, 450. Upon these considerations and a review of the evidence we are of opinion that the decree must be reversed."

The authority cited by the Supreme Court, *Davis vs. Schwartz*, 155 U. S., 631, 39 L. ed., 289, has the following language:

"1. As the case was referred by the court to a *master to report*, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Revised Statutes, § 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, *it must be treated as unassailable. Wiscart v. Dauchy*, 3 U. S., 3 Dall., 321 (1: 619); *Bond v. Brown*, 53 U. S., 12 How., 254 (13: 977); *Graham v. Bayne*, 59 U. S., 18 How., 60, 62 (15: 265, 266); *Norris v. Jackson*, 76 U. S., 9 Wall., 125 (19: 608); *Mercantile Mut. Ins. Co. v. Folsom*, 85 U. S., 18 Wall., 237, 249 (21: 827) 833; *The Abbotsford v. Johnson*, 98 U. S., 440 (25: 168)."

A reference to the decision of the Circuit Court of Appeals for the Eighth Circuit, in *Gilliland vs. Adamson*, reported in 227 Fed. Rep., 93, shows the question of fact involved to be very similar in character to the questions of fact involved in the case at bar. The Circuit Court of Appeals said at p. 93:

"The only question involved is one of *fact*, and that is whether the vulcanizing device patented by appellee was made, used, and sold by appellant prior to appellee's alleged invention."

After considering the matter on which the district court made its findings, the Court of Appeals for the Eighth Circuit, which was the decision reversed by the Supreme Court, said:

"Those facts demonstrated beyond a reasonable doubt that the appellant used and sold a vulcanizer embodying all the features contained in appellee's patent, not only before the patent was issued, but even before the idea became definitely formed in appellee's mind. Therefore the decree of the lower court must be reversed, with direction to dismiss appellee's bill."

This finding of the Court of Appeals for the Eighth Circuit is the finding that was reversed by the Supreme Court in the language first above quoted. We believe, therefore, that the findings of fact in the case at bar should, in view of the open court trial under the new rules, to use the language of the Supreme Court, "be treated as unassailable."

The law as to the degree of proof required here is fully discussed in a decision of this court in *Diamond Patent Company* vs. *S. E. Carr*, 217 Fed., 400, and consequently it will not need to be expanded upon here, that anticipation must be complete and proved beyond a reasonable doubt.

CONCLUSION.

The conclusion seems quite inevitable under all the circumstances, under the law and all the facts in the case. We confidently submit that the decision and decree of the Court below must be affirmed at defendant-appellant's cost.

Respectfully submitted.

FRED L. CHAPPELL,
Attorney for Appellee.

Kalamazoo, Mich., March 7, 1917.

JOHN H. MILLER,
Of Counsel for Appellee.

Note—At the time of writing this brief we have not yet received a copy of appellant's brief, and therefore reserve the right to apply to the court for permission to file a reply brief after the appellant's brief shall have been received.

F. L. C.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CENTRAL CALIFORNIA CANNERIES COMPANY,
Appellant.

GRIFFIN & SKELLEY COMPANY,
Appellant.

J. C. AINSLEY PACKING COMPANY,
Appellant.

ANDERSON-BARNGROVER MANUFACTURING
COMPANY,
Appellant.

GOLDEN GATE PACKING COMPANY,
Appellant.

J. F. PYLE & SONS, INC.,
Appellant.

HUNT BROTHERS COMPANY,
Appellant.

SUNLIT FRUIT COMPANY,
Appellant,

vs.

DUNKLEY COMPANY,
Appellee.

No. 2915.

Filed

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Reply Brief on Behalf of Defendants-Appellants.

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Appellee.

No. 2915

REPLY BRIEF ON BEHALF OF DEFENDANTS-
APPELLANTS.

PRELIMINARY REMARKS.

We believe there should be, at this time, a word of explanation respecting the length of the briefs filed herein on behalf of the defendants-appellants.

Their length, to a large extent, has been made necessary by the misleading presentation of its case by the plaintiff-appellee, both in this Court and the lower Court.

Furthermore, this litigation is of such importance by reason of the immense amounts involved, that it has been thought proper to fully discuss all of the propositions which would show the plaintiff-appellee to be without right of recovery.

This litigation is not only of importance to the defendants-appellants, but it is of vast importance to the public generally. Necessarily, it will be the ultimate consumer who will be called on to pay the annual tribute demanded by the owner of the Dunkley patent for the privilege of using, in any form of apparatus or machine, the broad *idea of means* monopolized thereby. The immensity of such annual tribute, so demanded, is indicated in the papers, herein filed in this Court, in support of the motion made by the plaintiff-appellee for an order increasing the supersedeas bonds filed in the lower Court by two of the defendants.

Bonds, aggregating \$200,000.00, were demanded from said two defendants alone. However, said sum

is insignificant compared with the total demands of the plaintiff-appellee.

In the affidavit, filed in support of said motion, it is claimed that 15c per bushel is saved by the use of the invention monopolized by the Dunkley patent "over and above the old methods and machines open to use by the appellants." At ~~50~~⁴⁰ pounds to the bushel, said claim of savings amounts to \$6.00 per ton. In the February, 1917, issue of the "Western Canner and Packer" it is estimated that in 1916, the California pack of canned peaches amounted to 3,700,000 cases. A case contains approximately 50 pounds of peaches. Therefore, according to said estimate, just the California 1916 pack alone amounted to 185,000,000 pounds or 92,500 tons of canned peaches. As the lye process is generally used for peeling peaches in this State, as well as elsewhere, it is safe to estimate that at least 90,000 tons were so peeled in 1916. At \$6.00 per ton, the total claim of plaintiff-appellee would amount to \$540,000.00 for just one year's pack in only one State of the United States. That said amount is not an exaggeration of the claims of the plaintiff-appellee, is indicated by the fact that, in these suits against only a few of the total number of canners engaged in the business, the plaintiff, in the lower Court, demanded herein supersedeas bonds aggregating in amount, the sum of \$655,000.00.

In view of the foregoing, it is apparent that the total claims of the plaintiff-appellee, for the remain-

ing fourteen years of the life of the Dunkley patent, run into millions of dollars.

Said millions of dollars would, of course, have to be paid ultimately by the general public, if the plaintiff's claims are sustained. The importance of this litigation is, therefore, obvious and, by reason thereof, we feel justified in fully presenting at length all of our contentions.

It is to be noted that plaintiff-appellee's alleged right of recovery of said millions of dollars is based solely upon the oral testimony of three witnesses given thirteen years after the occurrence of the events testified to and uncorroborated by any documentary evidence which, on its face, proves anything relevant or material; that two of said witnesses, father and son, are highly interested in the results of the litigation and the other witness, a nineteen-year-old boy at the time of the occurrences testified to by him, is a former employee of the Dunkleys; that said oral testimony herein is contradicted by the former testimony of two of said witnesses given six years before the trial of this case; that said testimony is contradicted by the testimony of three witnesses called by the defendant-appellant and by documentary evidence produced by one of them; and that said testimony is disproved by its own self-destructive inconsistencies and contradictions and by its inherent improbabilities.

We respectfully submit that it would be impossible to find reported anywhere another case in which

a plaintiff's claim for such an immense sum, as is involved herein, was sustained by the character of proofs offered herein in behalf of plaintiff-appellee.

As said by Judge Cox in *Thayer v. Hart*, 20 Fed., 693:

"The evidence of prior invention is usually entirely within the control of the party asserting it, and so wide is the opportunity for deception, artifice, or mistake, that the authorities are almost unanimous in holding that it must be established by proof clear, positive and unequivocal. Nothing must be left to speculation or conjecture."

I.

ON AN APPEAL IN AN EQUITY SUIT, THE WHOLE CASE IS BEFORE THE COURT FOR ITS DECISION ON THE MERITS.

In the case of *Waterloo Min. Co. v. Doe et al.*, 82 Fed., 45, this Court, speaking through District Judge Knowles, Judges Gilbert and Bellinger concurring, said:

"It is further urged by appellees that this court is bound by the findings of facts of the circuit court, unless they are found to be clearly and palpably erroneous. On an appeal in an equity suit, the whole case is before the court, and it is bound to decide the same, so far as it is in condition to be decided, on its merits. Beach, Mod. Eq. Prac., p. 978; Ridings v. Johnson, 128 U. S., 212, 9 Sup. Ct. 72; Garsed v. Beall, 92 U. S., 684-695; Johnson v. Harmon, 94 U. S., 371. If a case

has been referred to a master, and he has made findings of fact, there ought to be exceptions to the same, if any party to the suit is dissatisfied therewith, and a ruling upon the same made by the chancellor. If this course is not adopted, these findings cannot be reviewed on appeal. It is to be observed, however, that the findings of fact by the circuit court are not without some weight in considering the merits of the case. *This case, therefore, is presented to this court upon its merits, and must be considered upon the evidence, with such aid as may be found in the findings of the circuit court.*"

In *Riding v. Johnson*, 128 U. S., 212, 218, the Supreme Court said:

"But, on an appeal in an equity suit, the *whole case* is before us, and we are bound to decide it so far as it is in a condition to be decided."

In *Johnson v. Harmon*, 94 U. S., 371, the Supreme Court said:

"It is the duty of the court of first instance to decide (as was done here) upon the whole case, pleadings, evidence, and verdict, giving to the latter so much effect as it is worth. An appeal from the decree must be decided in the same way, namely, upon the *whole case*, and cannot be made to turn on the correctness or incorrectness of the judge's rulings at the trial of the feigned issue."

In *Garsed v. Beall et al.*, 92 U. S., 684, 695, the Supreme Court said:

"Equity courts may decide both fact and law, but they may, if they see fit, refer doubtful ques-

tions of fact to a jury. Findings of the kind, however, are not conclusive, and, if not satisfactory, they may be set aside or overruled, but if the finding is satisfactory to the Chancellor, the practice is to regard it as the proper foundation for a decree. *Harding v. Handy*, 11 Wheat., 103. *Such findings are regarded as influential in an appellate court, but they are not conclusive. Goodyear v. Rubber Co.*, 2 Cliff., 365; *Brockett v. Brockett*, 3 How., 691; 2 *Dan. Chan. Prac.*, 4th Am. Ed., 1072. Consequently, counsel were allowed to review the whole evidence in the case, and the court has followed the course adopted by the counsel at the argument, and the result of the review of the evidence is that the court is clearly of the opinion that the findings of the jury were correct in all material respects, and that there is no error in the record."

In the case of *Alexander v. Redmond et al.*, 180 Fed., 82, the Circuit Court of Appeals for the Second Circuit, speaking through Circuit Judge Lacombe, said:

"This being an appeal in equity, the facts as well as the law are open for our consideration, as they would be even if the jury had rendered a verdict without direction, and the issues must be disposed of upon the record brought here from the circuit court. No reservation of a motion to reopen the case extends to this court. The circumstance that a jury was impaneled is immaterial. Appeal in equity brings the cause here for final disposition."

Opposing counsel contend that the long and well established rule of review, set forth in the foregoing

decisions, has been changed by the decision of the Supreme Court in the case of *Cecil F. Adamson v. David C. Gilliland*, reported in the United States Supreme Court Advance Opinions of February 15, 1917, at page 169. At page 41 of their brief, opposing counsel state their contention in the following language:

“We are very confident at this juncture that the law is settled by the United States Supreme Court, that a *finding of fact* determined in open court trial in a district court must be, to use the language of that court, ‘*treated as unassailable.*’”

Of course, said *Adamson v. Gilliland* decision does not establish any such radical and far-reaching innovation in the review of equity cases by an appellate court. If opposing counsel were correct in their contention, the right of appeal, in most equity cases would be of no value to the appellant; the appellate court would be limited to a mere review of matters of law. Furthermore, such suggested rule of procedure would be incompatible with the other well established rules controlling the review of an equity case by an appellate court. The appellate court is compelled to finally dispose of an equity suit and must consider, not only all the proofs considered by the lower court, but also all proofs improperly excluded by the lower court.

If the Supreme Court intended to revolutionize the practice on appeals in equity cases and intended

to limit an appellate court's powers of review therein to a mere consideration of alleged *errors of law*, it would have so expressed itself in no uncertain terms. Such a radical innovation, if intended, undoubtedly would have been announced in an opinion reviewing the long line of decisions to the contrary and giving elaborately considered reasons justifying such a revolutionary departure therefrom.

The said *Adamson v. Gilliland* decision is not susceptible of the interpretation placed upon it by opposing counsel. *In fact, in that very case, the Supreme Court follows the rule, laid down in the numerous authorities above referred to, and considers and reviews at length the evidence therein.* Certainly, if the Supreme Court intended to announce a new rule of procedure, it, contemporaneously with the announcement of such rule, would not ignore and violate it. The Supreme Court's course, in reviewing the evidence in the *Adamson* case, amounts to a reaffirmation of the well and long established rule announced by this Court in the case of *Waterloo Min. Co. v. Doe et al.*, *supra*: "*This case, therefore, is presented to this court upon its merits, and must be considered upon the evidence, with such aid as may be found in the findings of the circuit court.*"

That no such novel rule is announced or is intended to be announced in said *Adamson* case, is made absolutely certain by the Supreme Court specifically basing its decision therein upon its *review*

of the evidence. The opinion, in said case, ends with the following statement: "Upon these considerations and a review of the evidence we are of opinion that the decree must be reversed."

In its said opinion, the Supreme Court refers to a "*practical rule*" announced in the case of *Davis v. Schwartz*, 155 U. S., 631. It will be noted that said rule is referred to only as a "*practical*" rule. In other words, the Court was careful not to refer to such rule as a *rule of law* controlling and limiting the scope of an appellate court's review of a decision in an equity case. Said rule, when considered merely as a "*practical rule*" applicable to a consideration, by an appellate court, of the evidence in an equity suit, not referred to a master, as in the *Davis v. Schwartz* case, is merely the announcement of a common sense attitude that naturally would be assumed by any court under certain circumstances. For instance, in a case where two witnesses, for one side, testify to a certain state of facts and two or three witnesses, for the other side, testify to a different state of facts, and there is nothing inherently improbable and no self-destructive inconsistencies in the testimony of either set of witnesses, it would be but common sense for an appellate court to apply the so-called "*practical*" rule referred to by the Supreme Court. In other words, in an equity suit, *not* referred to a master *by consent*, the said "*practical*" rule is not a "*rule of law*," limiting and curtailing the powers of an appellate court, but

is merely the expression of a common sense rule or attitude applicable to a consideration of conflicting evidence of a particular character.

This Court is familiar with the case of *Davis v. Schwartz, supra*. In fact, the writer cited it in arguing the case of *Marshall & Stearns Co. v. Murphy Mfg. Co.*, 199 Fed., 772. In that case, *the whole case* was, *by consent of the parties*, referred to a master to determine the *whole case*. Of course, the lower court could not have made such a reference of the *whole case*, in the absence of the parties' consent. A court cannot delegate its judicial powers to another. In the *Davis v. Schwartz* case, the *whole case* was likewise referred, *by consent*, to a master. It was such *consent reference* that formed the basis of the Court's remarks therein and which are quoted in the *Adamson v. Gilliland* case. In the *Davis v. Schwartz* case, the Supreme Court says:

"The question of the conclusiveness of findings by a master in chancery under a *similar order* was directly passed upon in *Kimberly v. Arms*, 129 U. S., 512, in which *a distinction is drawn* between the findings of a master *under the usual order to take and report testimony*, and his findings when the case is referred to him *by consent of parties, as in this case*. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet when the parties select and agree upon a special tribunal for the settlement of their controversy,

there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, *where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court.*"

The foregoing shows that the said rule, announced in the *Davis v. Schwartz* case, was specifically limited, in its application, to an equity suit referred, *by consent*, to a master to hear and determine the *whole* case. There is, however, no law that declares an appellate court, in an equity suit not so referred, "*shall act upon the finding of a subordinate court*"; and the Supreme Court certainly did not intend to announce any such law or rule in the *Adamson v. Gilliland* case, in which it does not treat the findings of the lower court as binding on it, but, on the contrary, *reviews the whole evidence* and specifically bases its decision therein *on such review*.

This Court, in the case of *Wilson & Willard Mfg. Co. v. Bole*, 227 Fed., 610, very recently announced the rule, applicable to its review of an equity suit, as follows:

"The fact that the trial court decreed in favor of the appellees on conflicting testimony is entitled to consideration; but if this court is convinced that the decree is erroneous, after giving due weight and consideration to the superior advantages possessed by the trial court, a reversal must follow."

Furthermore, there is *no conflict* in the evidence

herein in respect to the Vernon machine being a complete anticipation of the Dunkley patent. We shall hereafter show that such Vernon machine is proved an anticipation by uncontradicted proofs. *Plaintiff* called only one witness who ever saw the Vernon machine in operation and that witness, Dawson, confirms and corroborates the testimony given by defendant's numerous witnesses concerning the construction and mode of operation of the Vernon machine. Plaintiff refrained from asking Mr. R. I. Bentley any questions regarding the Vernon machine although his affidavit shows he was familiar with the operation thereof, and his description thereof, in his affidavit, confirms and corroborates the said testimony of defendant's witnesses and of *plaintiff's* witness Dawson.

Furthermore, the Dunkley testimony should not be deemed to raise a substantial conflict in the proofs. Said testimony is *discredited testimony*—discredited by the former contradictory testimony given by the Dunkleys in the Dunkley-Beekhuis interference proceeding *six years* prior to the trial of this case in the lower court. Said testimony is likewise overwhelmed by the opposing proofs; it is disproved by its own self-destructive inconsistencies and it is disproved by its inherent improbabilities.

As said in *Moulton v. Sanford, etc. Railroad Co.*, 99 Me., 508, 59 Atl., 1023:

"But a conflict of testimony cannot be said to arise simply because one witness testifies contrary

to another. If it was so held, hardly a verdict could ever be set aside. It would be difficult to imagine a case that had been dignified with the verdict of a jury that would not present some conflict of testimony. Besides, if such were the rule, it would only be necessary to secure the evidence of a witness, however false, to hold a verdict once obtained.

"This rule cannot be so construed. It means there must be substantial evidence in support of the verdict—*evidence that is reasonable and coherent, and so consistent with the circumstances and probabilities in the case as to raise a fair presumption of its truth when weighed against the opposing evidence. When it is overwhelmed by the opposing evidence, a verdict cannot stand. Roberts v. Boston & Maine R. R., 83 Me., 298, 22 Atl., 174.*"

In *Estate of Irvine*, 102 Cal., 606, it is said:

"This contemporaneous evidence on the part of Mrs. Smith is so directly at variance with her oral testimony upon the same subject given so many years later, and is so corroborative of the testimony on the part of the administrator, that we think her oral testimony did not create a *substantial* conflict with that given on the part of the administrator, and that the above finding of the court was contrary to the evidence."

That is the precise situation in the case at bar. *Six years* before this case was tried in the lower Court, the Dunkleys testified that the first Dunkley peach peeler, Exhibit No. 10, was made in 1903, at a time when William Bruner was at South Haven, and that *he even may have made it*. William Bruner

testified *herein* that said machine was, in fact, made in 1903, when he was at the South Haven factory of the Dunkley Company, but that Campbell made it. The Dunkleys testify *herein* that it was made in 1902, admittedly almost a year before Brunker first went to South Haven or entered the Dunkley Company's employ.

In view of the Irvine decision, *supra*, such *changed testimony* of the Dunkleys *herein* "did not create a substantial conflict" with that given by Brunker and Campbell.

Furthermore, some of the most important and vital findings of the lower Court are not supported by any of the evidence or proofs herein. We shall hereafter show that the only possible basis for said findings are the misrepresentations resorted to by opposing counsel in arguing this case in the lower Court.

In view of the foregoing considerations, we respectfully submit that this *whole case* is now before this Court for its decision on the merits.

II.

DUNKLEY INTERFERENCE RECORD.

In view of the questions raised by the discussion of the testimony given in behalf of Dunkley in the Dunkley-Beekhuis interference proceeding, we shall file, with the Clerk of this Court, a printed copy of the record on behalf of Dunkley in said interference. The said copy is one secured by us from the United

States Patent Office. Our authority for filing said record for the Court to consider the same, is found in the case of *Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co.*, 133 Fed., 167. In that case, the Court of Appeals for the First Circuit said:

"Inasmuch, however, as we must examine the prior decisions to a certain extent in reaching whatever conclusions we may reach, it is necessary that we should point out the principles which should guide us in doing so. How are the cases to be brought together for this purpose? An answer based on necessary rules of procedure seems clear. It is essential that the facts brought out in the earlier litigation should be proved in the pending cause independently and according to the ordinary rules of evidence, *and that thereupon the court in the pending cause should advise itself as best it may of what appeared to the courts making the prior decisions from the opinions rendered by them, or from an informal ascertainment otherwise of what was laid before them.* As this ascertainment is merely to inform the conscience of the court in the pending cause, and to enable it to follow the lines of reasoning and the conclusions of the tribunals rendering the earlier decisions, it involves only a gathering of the history thereof from any reliable source. *This may be done by the informal production of the records in the earlier cases, as well as by a perusal of the opinions of the courts. The court in the pending suit may accept the statements of counsel so far as they are not controverted, or, if controverted, so far as the court can, by informal methods, satisfy itself in regard thereto.*"

III.

MISREPRESENTATIONS RESORTED TO BY OPPOSING COUNSEL AND FORMING BASIS OF THEIR ARGUMENT IN LOWER COURT AND IN THIS COURT.

Our duty to this Court, to our clients and to our clients' witnesses, demands that we now perform a most disagreeable task. It is an exceedingly unpleasant and distasteful one, but we have no alternative. Plaintiff's case is based on misrepresentations and its presentation to this Court is based on misrepresentations. We shall now consider some of the misrepresentations indulged in by opposing counsel, both in this Court and in the lower Court. We shall hereafter consider the influence some of said misrepresentations obviously had on the lower Court's decision herein. As stated by us, in our opening brief, we are determined this Court shall not be misled by any misrepresentations.

Misrepresentation to effect that evidence in Dunkley v. Beekhuis Interference is same as in this case in respect to Dunkley building any peach peeling device or machine prior to Bruncker's term of employment in 1903.

In his argument, in the lower Court, Mr. Miller stated, as follows:

"Now, the evidence that was produced in that case (Beekhuis-Dunkley Interference) is the same

evidence that has been produced here, evidence as to the date of Mr. Dunkley's conception, the date of Mr. Dunkley's application or reduction to practice, the building of his machine, and his application for a patent, including this big machine over here, this model, which was made in the fall of 1902. There is a judicial determination by the Court of last resort upon those facts, and *the finding of facts in that matter shows that this model was made in the fall of 1902, but without the lye-tank; that in the spring of 1903, the lye-tank was bought, and that in the peach-peeling season of 1903, the lye-tank was coupled up with this machine, and that this machine was put to use in actual peeling of peaches in 1903 * * **" (R. 682).

"There is no difference between the testimony that was given in the interference and the testimony that was given here; *the testimony is exactly the same in both cases*, that is to say, that this machine, Exhibit 10, together with the complete tank making it a machine that was complete in 1903; the letter of Clark shows that; it shows that the tank was obtained there; *but the machine without the tank was in 1902, and the machine with the tank was in 1903, and that is what the record shows in the interference case*, and that is exactly what the record shows here in this case" (R. 692).

In our opening brief we referred to said statements as gross misrepresentations of the facts and challenged opposing counsel "*to refer this Court to any testimony by any witness in said interference or any statement in any of the briefs filed therein by Messrs. Chap-
pell & Earl in Dunkley's behalf, even remotely suggesting or intimating that any part of said Dunk-*

"ley machine was made, commenced, bought or used,
 "prior to July, 1903, or at any time other than
 "during the four months' period when William
 "Brunker was at South Haven in the employ of the
 "Dunkley Company."

The answer to our challenge is made at page 58 of the appellee's reply brief and is as follows:

"It is true that we there made the statement that the testimony in the interference case was the same as the testimony in the case at bar. *On its face this statement may appear to be too broad*, but it was merely a statement made in oral argument by counsel which was not excepted to at the time, *and which is not shown to have influenced the Court*. It is not unusual in the heat of a verbal debate during a hotly contested case for an attorney to *color* his statements *more vividly* than he would *in the seclusion of his office* when writing a brief, and a charitable view to take would be to attribute his course to *excessive* zeal. But to attribute it to a deliberate intent to deceive the Court, and to characterize it as being 'despicable and contemptible,' and used for the purpose of 'bolstering up a charge of false swearing made against honest men,' so far exceeds the bounds of propriety as to be inexcusable. Much latitude may be accorded to zeal and enthusiasm, but no justification can be made for a breach of decorum. We resent the charge with indignation, trusting that our long experience before this Court will justify the conclusion that there was no intent on our part to deceive the lower Court."

It is to be noted that opposing counsel says: "*On its face, this statement may appear to be too broad*

. . .” leaving it to this Court to surmise just how much “*too broad*” it was. If opposing counsel expected a “*charitable view*” to be taken of his conduct, he should have freely and frankly informed this Court that his statement was incorrect precisely *to the extent* charged by us in our opening brief. However, opposing counsel evidently believed that such a frank and full confession would weaken his client’s case too much and, therefore, instead of making amends, to the fullest extent, for the injury done by his misstatement, he is still attempting to have his client profit by it. Such a full and frank admission of the extent of the inaccuracy of his said statements would also prove the other counsel for appellee to be guilty of resorting to almost identically the same misrepresentation in his contribution to this same reply brief. On page 4 thereof, Mr. Chappell indulges in the following misrepresentation :

“The proofs in the Interference proceeding are not here. Defendants did not dare to offer them in their entirety, because the numerous witnesses there sworn *entirely support the dates that are fixed here*, as counsel for defendants-appellants very well knows.”

“Counsel for the defendants-appellants very well knows” that the foregoing statement is a gross misrepresentation of the facts and, by filing the Dunkley Interference record with the Clerk of this Court, said counsel is placing this Court in a position to likewise

know that said statement is a gross misrepresentation of the facts. Furthermore, said misrepresentation was resorted to "*in the seclusion*" of opposing counsel's office and is not, therefore, to be attributed to the "*heat of a verbal debate.*"

There is not, in said Dunkley Interference record, the remotest intimation by anyone that any peach peeling device or machine or part of any such device or machine or any model or part of a model, embodying the Dunkley invention, was made, bought or used prior to the period of William Bruncker's employment, in 1903, by the Dunkley Company. On the contrary, said record *affirmatively* shows, as follows:

1. The contention that Dunkley conceived the invention in August, 1902. (See Dunkley Preliminary Statement quoted at page 77 of our opening brief.)

2. The contention that he did not *even disclose his mental conception thereof* to anyone until September, 1902 (Dunkley Preliminary Statement).

3. *That no model of the machine was ever made* (Dunkley Preliminary Statement).

4. The contention that Dunkley, in September, 1902, made some sketches disclosing his invention but *that these had been lost* (R., pp. 485-489, and Preliminary Statement).

5. That the so-called model machine, Exhibit No.

10, was considered *by Dunkley* to be a "regular working machine" (R., 485-489).

6. That said machine, Exhibit No. 10, was made in 1903, at a time when Brunker was at the Dunkley South Haven factory (R., 485-489).

7. That, according to Melville Dunkley, *Brunker* or *Campbell may have made it* (Testimony quoted at p. 72 of our opening brief).

8. That, according to the witness Verhage, Campbell made the *wooden-frame* of Exhibit No. 10 in July, 1903 (Testimony of Verhage quoted at p. 74 of our opening brief. *This Verhage testimony conclusively disposes of the Dunkley "excuse" for changing their testimony. He says the "wooden frame" was made in 1903, thus corroborating Campbell, Brunker and Mapes, and the Dunkley interference testimony. The Dunkleys now say herein, six years later, that said identical wooden frame was made in 1902.*)

Said record *fails* to refer to or show or disclose anything regarding the following *alleged facts* referred to in Mr. Miller's statement *as being actually disclosed in said record*:

1. The *making*, at any time, of any lye-tank for said model machine, Exhibit No. 10.

2. The *purchase*, at any time, of any lye-tank for said model machine, Exhibit No. 10.

3. The *coupling-up*, with said model machine, Exhibit No. 10, at any time, of any lye-tank.

4. The *use* of any lye-tank, at any time, with said model machine, Exhibit No. 10.

Of course, the witnesses refer to the initial subjection of the peaches to a lye-solution, but said solution could have been heated, so far as their testimony indicates, just as Brunker said, in a wash boiler and the peaches dipped therein and then deposited in the model-machine to be therein *brushed* and sprayed. As Campbell and Brunker said, the model machine was never used commercially.

The testimony of Campbell and Brunker shows that no lye-tank was a part of or used with said model-machine, and the interference testimony of Dunkley, quoted in the record herein at pages 485 to 489, corroborates their testimony. When asked the *size* of said model-machine, Exhibit No. 10, the patentee Dunkley said:

"Q. 18. How large was it?

"A. In size or capacity?

"Q. 19. Both.

"A. Well, *it was a little over 5 or 6 feet long, about 3 feet wide* and had a capacity of from 100 bushels to 200 bushels of peaches per day" (R. 487).

Plaintiff's Exhibit No. 10 is the *wooden-frame* of said model machine and it was exhibited to this

Court at the time of the oral argument. *Said frame is precisely 5 feet and 8 7/8 inches long and 3 feet and 5/8 inches wide.* According to Dunkley's said measurements of said model machine, the same could not have comprised anything but the skin-removing means mounted on said frame. In other words, the length of the machine, as so stated by Dunkley, is sufficient only to embrace said *wooden-frame*, thus showing that there was no tank included as a part of the machine. The addition or presence of such a tank as a part of such machine would increase the length of the machine to ten or twelve feet at the very least. Verhage said such "*wooden-frame*" was made by Campbell in 1903.

In the interference proceeding, Melville Dunkley testified as follows:

"Q. 9. I call your attention to the counts in this interference, which were originally numbered 3, 4, 5 and 6, but now bear numbers 1, 2, 3 and 4, ask you to read the same over, and state if you understand the structure to which these counts refer.

"A. Yes, sir, I do.

"Q. 10. When did you *first become acquainted with such a structure*, and state the circumstances? Indicate both the time, as near as you are able, and the circumstance.

"A. I became acquainted with a similar structure *during the summer of 1903*, as we built a machine having those characteristics and used southern fruit in a trial" (Interference Record, p. 71).

The "*counts*," referred to in the above question 9, are set forth at page 485 of the record herein. It is to be noted that each of said counts merely and alone describes the "*brush-spray-pipe skin-removing means*" of the Dunkley machine. No lye-tank or "skin disintegrating means" is included in the *structure* described in any one of said counts. In answer to the question when he *first became acquainted* with the "*structure*" referred to in the counts, it is to be noted Melville Dunkley says: "*during the summer of 1903.*" Said "*structure*" was the only "*structure*" involved in the interference proceeding.

Notwithstanding the foregoing testimony and all the other interference testimony heretofore quoted by us and to the effect that said structure, to wit, the model Exhibit No. 10, was not built until 1903, opposing counsel, Mr. Chappell, has the audacity to indulge in the following remarks at page 4 of appellee's reply brief:

"They did not offer that record. They attempted a sort of *sharp-practice* by quizzing about an isolated portion here and another portion there, and they now wish to explain the very different things proven here from those which were proven in the Interference proceeding.

"The proofs in the Interference proceeding are not here. Defendants did not dare to offer them in their entirety, because the numerous witnesses there sworn *entirely support the dates that are fixed here, as counsel for defendants-appellants very well knows.*"

The Interference record is now on file with the Clerk of this Court. *The testimony therein conclusively proves that the two Dunkleys committed deliberate perjury in the case at bar.* Said record, however, proves more than this. It does not prove opposing counsel guilty of some "*sort of sharp practice*"; it merely proves them guilty of a "*sort of practice*" just the opposite. They apparently did not think we were in earnest when we said, in our opening brief, that we were determined this Court should not be misled by any misrepresentations.

Said Interference record was not offered in evidence because, *as a whole*, it could not be properly used to impeach the testimony of the two Dunkleys. It contains the testimony of other witnesses. *However, sufficient of the Dunkley interference testimony was read to them, when on the stand herein, to show the conflict and vital inconsistency between such former testimony and their testimony herein.* There is absolutely nothing in said interference record which tends, in any way, to explain or lessen such conflict. In fact, the whole of said interference record conclusively shows that the Dunkley testimony herein is false and that the model-machine, Exhibit No. 10, was not built until after Brunker's arrival at South Haven in 1903, *just as Brunker and Campbell said, when on the stand herein.*

If there was anything in the Interference record which even remotely suggested the building of the

model Exhibit No. 10, or any part thereof, before Brunker went to South Haven in 1903, opposing counsel would have gladly accepted the challenge, contained in our opening brief, and *quoted* it. The excuse offered for not accepting our challenge is given in the following language by Mr. Miller, at page 16 of appellee's reply brief:

"Another matter we venture to note is the copious reference in defendants' brief to matters dehors the record. *Purported* quotations from the proceedings in the Patent Office and the briefs filed therein, as well as other matters, are indulged in. Indeed, we are invited to follow the example and even 'challenged' to do so, and the Court is asked to note if the challenge is accepted. We pass this by with the remark that *we are arguing this case on the record which is before the Court, and shall not so far forget a counsel's duty as to depart from the canons of proper practice.*"

In view of the circumstances prompting us and compelling us to make said challenge, it is hardly conceivable that anyone, unless entirely devoid of a sense of humor, could have indulged in the foregoing answer to our challenge. The record before this Court shows that, in his argument in the lower Court, opposing counsel not only referred to what was disclosed in the Interference record, but grossly misrepresented what was disclosed therein. He was the *first one* to go outside the record herein. He was the one who *first* "*so forgot a counsel's duty as to depart from the canons of proper practice.*" As

stated at page 71, of our opening brief, *we went outside the record herein in order to answer opposing counsel's misstatements regarding the Interference record.* As opposing counsel's misrepresentation consisted principally of a statement of what was *not* disclosed in said record, the burden was on us to prove a *'negative*. We, therefore, challenged opposing counsel to *quote* any portion of said record which would support what we characterized as a gross misrepresentation on his part. His answer is that he cannot "*so far forget a counsel's duty as to depart from the canons of proper practice*" and go outside the record a *second time* to justify his *first* excursion therefrom into the realms of the imagination.

Misrepresentation to the effect that Brunner was asked to identify a machine and pointed out the wrong machine.

This misrepresentation was indulged in by opposing counsel at the time of the oral argument in this Court and, therefore, we shall, *as requested by them*, take a "charitable" view of the same and attribute it to the "*heat of a verbal debate.*" At that time, the writer denied that any such episode occurred. However, the Court apparently evinced such interest in the matter, that opposing counsel evidently thought it a misrepresentation well worth repeating "*in the seclusion of his office.*" Therefore, on page 64 of appel-

lee's reply brief, we find said misrepresentation expressed in the following language:

"When he (Brunker) *was asked* in Court to point out the machine referred to, *he pointed out the wrong machine*. At that time plaintiff's Exhibit 10 and another peach-peeling machine were on exhibition in Court, and on looking around the room his eye fell upon the wrong machine and he promptly pointed to that machine *as the one* which Stewart Campbell built in 1903 (R. 69)."

Page 69 of the record contains only testimony given by Melville Dunkley. Brunker's testimony commences at page 598 and ends on page 632. We, therefore, presume the reference to "R. 69" at the end of the above quotation is *merely* an error, *although it makes it more difficult for one to locate that portion of Brunker's testimony represented as supporting the quoted remarks*. However, as Brunker only pointed to one machine, during the course of his examination, there is no difficulty in identifying the only portion of testimony, in any way, relating to such an episode. Before quoting said testimony, we wish to state that, when Brunker was on the stand, there was located on the floor, in front of the witness chair, "Plaintiff's Exhibit No. 6" (R. 75), a model made for the purposes of the trial and illustrating the "*skin-removing means*" of the Dunkley invention. Said model was in this Court at the time of the oral argument. It consisted of a wooden frame having

mounted therein the endless carrier or belt *brush*, two rotating cylindrical *brushes* and the three perforated pipes; it also included the gears, pulleys, etc., for operating the brushes. In other words, said model illustrated the Dunkley "*skin-removing means*" and was, therefore, *substantially similar to the first Dunkley model machine*, the *wooden-frame* of which is in evidence as Exhibit No. 10. At the time Brunker was testifying, there was resting on the top of the frame of said Exhibit 6, "Plaintiff's Exhibit No. 4" (R. 74), a model of a part of one of the defendant's machines. This model embraced a perforated iron cylinder mounted in a wooden frame. Such a device is shown as part of the machine illustrated in the drawing at page 26 of the record.

Brunker was asked to describe the peach peeling machine made by Campbell when Brunker was at South Haven in 1903. He commenced describing said machine and very naturally pointed to the model of the Dunkley machine, Exhibit 6, as being *like* the machine made by Campbell, *at the same time*, referring to the *differences* between the two. Instead of identifying Model No. 6 as being the *actual machine* made by Campbell, *he did just the contrary* and pointed out some of the *differences* between it and Campbell's machine. His testimony reads as follows:

"(MR. WHITE)—Q. What kind of a machine did he afterwards build?

"A. He built a machine, *like that*, with a car-

rying belt to carry the peaches along and the brushes alongside were 3 feet long; they revolved and peeled the peaches that were carried through on that belt.

"Q. Have you ever been in this courtroom before?

"A. No.

"Q. What machine did you point to in giving your last answer?

"A. Well, I pointed to that; *it resembled that some*; only this was not on top when I saw it, this metal; you see we only put—we had a sheet of galvanized iron lying around the place and we simply bent it over to keep the water off of me when I was peeling the peaches; there was nothing like that on it" (R. 601).

The foregoing embraces the testimony upon which opposing counsel bases his statement or rather misstatement that Bruner "*was asked to point out the machine*" built by Campbell and "*he pointed out the wrong machine.*"

When Bruner, in the midst of describing a machine he had not seen for years, suddenly saw before him a machine *embodying substantially the same features* and spontaneously pointed to it *as like* the (not *as the*) one he was then mentally picturing and verbally describing, the writer thought his act of *spontaneously* pointing to said machine *so natural* that he wished to emphasize the matter and, therefore, asked the witness if he had ever been in the courtroom before, with the idea of showing and emphasizing the fact that the witness acted *spontaneously* in so point-

ing out Exhibit 6 as a machine "*like*" or "*resembling*" the machine built by Campbell.

That Bruncker's act, in so referring to Exhibit 6 as being "*like*" and "*resembling some*" the machine built by Campbell, was a *most natural thing* for him to do is proved by a *precisely similar episode occurring during the examination of plaintiff's witness Fontana*.

Fontana, in February 1904, took charge of the California Fruit Cannery Association plant at Fresno. When he went there, at that time, he found one of the *enlarged* Vernon machines. Of course it was not in use and Fontana did not testify he ever saw it in use. However, he was asked to describe said Vernon machine and replied that it was "*very similar to what I see in front of me now*." What he saw in front of him, was the same model of the Dunkley machine referred to by Bruncker and marked "Exhibit No. 6." His testimony is as follows:

"MR. CHAPPELL—Q. Please state what you found there as a peach peeling machine at that time?

"A. *Something very similar to what I see in front of me now.* (Model of Dunkley machine, Plaintiff's Exhibit No. 6.)

"Q. Will you please describe in your own language what it was?

"A. There was a conveying-belt where women would split the fruit, and the belt went into a scalding or grass-hopper, as we then called it, with a solution for peeling peaches, or to loosen the

skin; from there it dropped into two tanks of water, and it was conveyed from those two tanks into what we called a *brush machine*, which looked very much like the machine in front of me now." (Model of Dunkley machine, Plaintiff's Exhibit 6.)

"Q. That is a pair of brushes?

"A. A pair of brushes and a small belt to assist the peaches through these brushes.

"Q. What was the water supply to this machine, and how many pipes did it comprise?

"A. There were two pipes through the machine—there were either three or four brushes, there were two belts, and *there was a pipe, that is between each of those two brushes.*

"THE COURT—There was a double installation?

"A. There must have been a double installation, and then there were very small perforations in these pipes; the pipe must have been about $\frac{5}{8}$ ths or $\frac{3}{4}$ ths of an inch pipe" (R. 471).

The foregoing testimony of *plaintiff's* witness Fontana shows that the Vernon machine embodied every element of the Dunkley machine. Of course, Fontana did not see any "*sprays*" in the machine because he does not pretend to ever have been at the Fresno plant *when said machine was in operation*. However, he says the machine embodied the perforated pipes and it was from the perforations in such pipes that the water issued in the form of "*spray*" and played on the peaches traveling along beneath the pipes. *Plaintiff's* witness Dawson saw the Vernon machine in operation and he referred to the presence of the "*spray*" action therein (R. 634). Therefore, *plain-*

tiff's witnesses, Fontana and Dawson, proved that the Vernon machine was *a complete anticipation of the Dunkley patent*.

It is to be noted that *plaintiff's* witness, Fontana, when first asked to describe the Vernon machine was content to describe it as a machine "*very similar to what I see in front of me now,*" and what he saw in front of him was Plaintiff's Exhibit No. 6, a model made for the purpose of illustrating the Dunkley invention. In other words, the respective "*brush-spray-pipe skin-removing means*" of the two machines appeared to the witness *to be so identical in construction* that he thought his said reference to such Dunkley model before him was a sufficiently accurate description of the Vernon machine and, therefore, *a complete answer to the question*. Not only did he once refer to such identity between the two machines, but he repeated his remarks to that effect. Furthermore, his detailed description of the Vernon machine shows that it was substantially identical with the Dunkley machine.

The witness Bruner was not asked to identify "Plaintiff's Exhibit No. 10" as the *wooden-frame* of the model machine built by Campbell because we did not think it fair to him to request him to attempt any such identification. Said Exhibit 10 is the mere skeleton of the machine built by Campbell in September and October of 1903, and it naturally would be a most difficult task for one to say, in 1916, that the

pieces of wood and the fragments of iron attached thereto actually formed a part of the original brush-spray-pipe mechanism made by Campbell in 1903. Campbell was able to identify said "skeleton" because he made it and could, therefore, recognize his handiwork therein. However, Brunker did correctly describe the model machine made by Campbell and his description thereof shows he had a vivid mental picture of the same. It was the first and *only* machine of the kind he ever saw and naturally he was able to remember such a novel device. It is to be noted that Brunker's description thereof shows it was a "*single-line*" machine and *that no lye-tank was used therewith or formed a part thereof*. It is also to be noted that Brunker says it was the *only* machine of the kind, at South Haven while he was there. It is also to be noted that Brunker says no peaches were commercially peeled on such a machine while he was at South Haven. It is admitted that, prior to November 1, 1904, only two Dunkley peach-peeling machines were built. It is also admitted that the second Dunkley peach-peeling machine, designated as the *first Dunkley commercial machine*, was a "*three line*" machine. Therefore, there is no question about Brunker's testimony referring to the "*single-line*" model machine, *the first Dunkley machine built*. In other words, Brunker's testimony is *only applicable* to the Dunkley "*single-line*" model machine of which Exhibit No. 10 is the wooden frame. *There was no*

other peach-peeling machine which fits Bruncker's description of the machine built by Campbell in September and October of 1903. Furthermore, Bruncker's narrative of the events and circumstances leading up to the building of said one-line model machine conclusively demonstrates that said model was the first machine built and that no similar machine had theretofore been built by Dunkley.

Misrepresentation to effect that Campbell claimed to have invented all of the machines, except one, installed and used in the Dunkley cannery and for which Dunkley secured the ten patents offered in evidence.

At page 158 of our opening brief, we called attention to a similar misrepresentation indulged in by Mr. Miller at the oral argument in the lower Court. However, in the briefs filed by them in this Court, both opposing counsel indulge in even grosser misrepresentations of the same nature.

At page 34 of the "Brief of Appellee," Mr. Chapell says:

"Mr. Campbell, on cross-examination, confessed (?) to being the inventor of all the structures which had been patented in Dunkley's name, although he had never had any experience whatsoever in the canning business up to that time and Dunkley had been at work at it all his life."

In the first place, it does not appear in the record that Dunkley had been in the canning business all his life previous to Campbell's employment. He says he

"started canning in the late 80's" (R. 477). Although it does not appear of record, our information is to the effect that, previous to that time, he was a house and fence painter and first got into the canning business through his sister-in-law, Miss Wing, a witness for him in the Interference proceeding and who first started the canning business as a small venture of her own. However, the matter is of no moment. It is to be noted, however, that, in addition to S. J. Dunkley, his sister-in-law Miss Wing and his son Melville, there were only two other witnesses called by Dunkley in the Interference, and both of them were, at one time, his employees.

At page 61 of the "Reply Brief of Appellee," Mr. Miller states:

"Not only did he (Campbell) claim to have devised and invented the peach peeling machine for which Mr. Dunkley secured a patent, but he also made a similar claim in respect of all the machines, except one, installed and used in the Dunkley cannery and for which Mr. Dunkley secured the ten patents which were offered in evidence. He claims to have invented and designed all of these machines out of his own head."

The foregoing was written after opposing counsel received our opening brief in which we called his attention to his similar misstatement, in the lower Court, of Campbell's testimony. However, opposing counsel seem determined to discredit Campbell even at the risk of discrediting themselves. In our opening brief,

we indicated the influence such a similar misrepresentation of Campbell's testimony had on the lower Court. Opposing counsel, therefore, apparently think it possible to also prejudice this Court against Campbell by a repetition of the same misrepresentation. Of course, if the said statements of opposing counsel were true, such preposterous claims, on the part of Campbell, would very naturally discredit him as a witness. *That is the reason why said misrepresentation is resorted to by opposing counsel.*

With the exception of the Dunkley patent in suit, all of the Dunkley patents, offered in evidence, were fastened together and marked "Plaintiff's Exhibit 9, Dunkley Canning Patents" (R. 477).

The following list includes all of said patents, together with the number of each, the date of application of each, the date of issuance of each, and the title of the invention disclosed in each one:

No.	Applied for		Issued		Invention
610,897	November	2, 1897	September	20, 1898	Fruit Jar or Can
673,048	March	30, 1900	April	30, 1901	Jar
721,166	March	13, 1901	February	24, 1903	Jar
35,098	May	20, 1901	September	17, 1901	Design for a Basket-Cover
724,170	May	20, 1901	March	31, 1903	Fruit Basket
779,537	May	12, 1902	January	10, 1905	Canning Machine or Apparatus
805,844	May	12, 1902	November	28, 1905	Automatic Processing or Cooking and Cooling Machine
794,598	November	29, 1904	July	11, 1905	Peach Splitting and Pitting Machine
974,759	November	29, 1904	November	1, 1910	Cherry-Pitting Machine
1,104,175	November	29, 1904	July	21, 1914	Machine for Peeling Peaches and Other Fruit
805,845	December	1, 1904	November	28, 1905	Machine or Apparatus for Automatically Processing or Cooking and Cooling Canned Food
921,523	February	27, 1905	May	11, 1909	Peach Splitting and Pitting Machine

In the first place it is to be noted that there are twelve of said Dunkley patents. Only *seven* of them are for "*machines*." Three of them are for "*jars*" and two for "*baskets*." Therefore, Mr. Miller's statement regarding the number of Dunkley patents for "*machines*" is incorrect. There are not "*ten*" Dunkley "*machine*" patents as stated by him. Campbell said nothing about inventing any fruit jars or baskets, and the patents therefor were applied for long before Campbell entered the Dunkley Company's employ in 1902.

In the second place, it is to be noted that only one of said patents was exhibited to Campbell. Opposing counsel examined him concerning patent No. 805,844 of November 28, 1905, for "Automatic Processing or Cooking and Cooling Machine." *Campbell not only did not claim to be the inventor of said machine but stated no such machine was at the Dunkley factory while he was there.* He testified as follows regarding said patent:

"Q. Will you look at that patent a little further and see whether you recognize it as showing any cooker that you saw at the plant at South Haven or any parts of it; I refer to the Dunkley plant.

"A. The only parts in this that look anything like it at all—of course it had a sprocket and chain for the carrying of the can through the water; they have a similar bracket on the chain; but otherwise it did not look anything like it, not anything like it here when I was there; there

was an open wooden cooker; that is closed" (R. 597).

The statement that Campbell claimed to have invented any of the other six machines respectively disclosed in the remaining six Dunkley patents, with the exception of the peach-peeler patent in suit, can only be based upon the similarity of the *title* given to each of said machines in the patent therefor and the *name* given by Campbell to any machine claimed by him as his invention.

The first *machine* patent on the list is No. 779,537 for a "Canning Machine or Apparatus." Regarding such a canning machine, Campbell testified as follows:

"Q. Did you have anything to do with the installation of the automatic canning machine?

"A. I had something to do with setting it up there.

"Q. Were there any friction gears to that, that you remember?

"A. I don't rememebr of any; *I don't think I had anything to do much with the construction, any more than placing counter shafts for them and setting the machines in place; the operation of them and so forth, and the like, I did not have anything to do with*" (R. 592).

The foregoing shows Campbell did not claim to have invented or to have even built the canning machine referred to. It is, therefore, most probable that said canning machine is the one covered by said patent No. 777,537. The application date of same, to

wit: May 12, 1902, confirms the foregoing. This disposes of patent No. 1 on the list.

The second patent in the list is No. 805,844 of November 28, 1905, for "Automatic Processing or Cooking and Cooling Machine." This is the patent exhibited to Campbell and already discussed. He did not recognize the device shown therein as "*anything-like*" any device at the Dunkley Company's plant (R. 597). This disposes of patent No. 2 on the list.

The third "machine" patent on the list is No. 794,598 of July 11, 1905, for "Peach Splitting and Pitting Machine." The seventh and last patent in the list is No. 921,523 of May 11, 1909, for "Peach Splitting and Pitting Machine." We shall discuss these two patents together because they are for the same kind of a machine, to wit: a peach-pitter.

It is admitted Campbell was actually employed to invent and build a peach-pitter. As stated by Melville Dunkley:

"A. He (Campbell) was employed primarily to develop the syruing machine and this *peach-pitter*, of which he had given some idea that he could build a machine capable of pitting peaches, *he was known as more or less of a genius* and was a brother of a family friend" (R. 457).

The building of said "syruing machine" and of said "peach-pitters" by Campbell is admitted by Dunkley (R. 456). Therefore, Campbell's claim to

having invented and built a peach-pitter is not disputed by the Dunkleys. It is admitted.

Furthermore, Campbell does not claim to have invented certain other peach-pitters taken to the South Haven plant. On this point he says:

"XQ. Did you ever see any pitting machine that Mr. Dunkley had produced?

"A. I did; I don't know whether Mr. Dunkley produced it; I saw one he brought there from the Kalamazoo plant while I was constructing the apparatus in South Haven.

"XQ. *You did not have anything to do with that construction?*

"A. *I did not.*

"XQ. When did you see that work?

"A. I saw two or three peaches run through it; two or three I say, I don't know how many; I saw a few run through one of the machines; I understood he had several; I think I saw two machines.

"THE COURT—Q. Pitters?

"A. Yes, both pitters.

"XQ. When did you see these?

"A. In 1904, while I was setting up this apparatus, this peach peeling line in 1904, along in July or August, somewhere along in 1904" (R. 567).

The foregoing shows that Campbell admittedly invented a "peach-pitter," and also that probably Dunkley invented another type of "peach-pitter." If the "peach-pitter," *admittedly invented by Campbell*, is disclosed in one of said Dunkley peach-pitter patents, above referred to, then Campbell certainly claimed he

was the inventor of the same and his said claim is admitted by the Dunkleys.

Opposing counsel, therefore, may be correct in stating Campbell claimed to be the inventor of *an invention* disclosed in one of said Dunkley peach-pitter patents. Of course, Campbell was not shown either of said peach-pitter patents and did not identify the device disclosed in either as *the "peach-pitter"* invented by him and, according to the Dunkley testimony, admittedly invented by him.

However, as Campbell admittedly invented one type of "peach-pitter" and as Campbell stated another type of "peach-pitter" had been brought to South Haven by Dunkley, it is most probable that one of said Dunkley peach-pitter patents discloses Campbell's invention and the other discloses Dunkley's invention. Certainly Dunkley's course in getting a patent on the peach-peeling machine invented by Campbell shows he was perfectly capable of also securing a patent on the "peach-pitter" *admittedly* invented by Campbell. It is to be noted said patents were respectively applied for on November 29, 1904, and on February 27, 1905. Campbell left the Dunkley Company's employ on September 3, 1904 (R. 542). The foregoing disposes of patents Nos. 3 and 7 on the list.

Patent No. 4 on the list is No. 974,759 of November 1, 1910, for "Cherry Pitting Machine."

Regarding the cherry-pitting machine, Campbell said:

"A. No. What little improvement I made on the cherry-pitters was done at South Haven; the early improvement on the feed, the clearance of them" (R. 574).

The foregoing shows Campbell did not claim to be the inventor of such cherry-pitter. He distinctly says he only made a *little improvement* in the feeding mechanism and that evidently had to do only with a matter of "clearance" of some part of the device. This disposes of No. 4 on the list.

Patent No. 5 on the list is No. 1,104,175 of July 21, 1914, for "Machine for Peeling Peaches and other Fruit." This patent is the one in suit. The circumstances leading up to the building by Campbell, in September and October of 1903, of the first model machine embodying the "*skin-removing means*" disclosed in this patent, have already been discussed.

Patent No. 6 on the list is No. 805,845 of November 28, 1905, for "Machine or Apparatus for Automatically Processing or Cooking and Cooling Canned Food."

Campbell stated that he built a "cooker," but there is nothing to indicate that the "cooker" referred to by him is the "Machine or Apparatus for Automatically Processing or Cooking and Cooling Canned Food" disclosed in said patent. When shown the Dunkley patent No. 805,844 for a similar apparatus,

Campbell said no apparatus like that shown in the patent was at the Dunkley plant. Evidently said patent was a mere "paper patent" and did not disclose any machine ever actually built. Therefore, if shown said other patent No. 805,845, Campbell possibly might have also failed to recognize the apparatus disclosed therein. Certainly, the "cooker" built by Campbell must have been a very simple arrangement, according to his meager description thereof. In any event, Campbell did not identify the apparatus disclosed in said patent No. 805,845, as his invention and there is nothing in the record to show that said "apparatus" is the "cooker" referred to by Campbell. That he worked on a cooker is not denied. Melville Dunkley said:

"Q. Mr. Campbell also worked on the cookers during the years 1902 and 3 did he?

"A. As a workman he might have worked on any of those different things" (R. 456).

The foregoing disposes of Patent No. 6 on the list. Patent No. 7 on the list has been discussed.

In view of the foregoing, it appears that there are only *seven* Dunkley "machine" patents and that Campbell's testimony *affirmatively* shows he did not claim to be the inventor of the "canning machine" mentioned in the first one; or of the cooking apparatus mentioned in the second one; or of the "cherry-pitter" mentioned in the fourth one; or of the peach-pitter mentioned either in the third one or in the

seventh one, he having claimed to be the inventor of only one peach-pitter.

If the "peach-pitter" disclosed in either of said Dunkley peach-pitter patents is the same as the one built by Campbell, then admittedly Dunkley obtained such patent for Campbell's invention because the Dunkleys admit Campbell invented the machine built by him.

The record does not show Campbell claimed to be the inventor of the apparatus mentioned in the sixth one of said machine patents.

Notwithstanding the foregoing facts, opposing counsel, in order to discredit Campbell, represent to this Court that:

"Not only did he claim to have devised and invented the peach peeling machine for which Mr. Dunkley secured a patent, but he also made a similar claim in respect of all the machines, except one, installed and used in the Dunkley cannery and for which Mr. Dunkley secured the ten patents which were offered in evidence. He claims to have invented and designed all of these machines out of his own head."

Having resorted to the foregoing misrepresentation as a basis and foundation for his attack on Campbell, opposing counsel, at page 63 of the "Reply Brief of Appellee", indulges in the following vituperation:

"We sum up Mr. Campbell's character by saying that in our opinion he is a soured, disgruntled, half-demented individual having a personal grudge

against Mr. Dunkley and giving his testimony for money."

We respectfully submit that Campbell is not the one discredited by such an attack based upon a misrepresentation of his testimony. Furthermore, if opposing counsel is sincere in intimating Campbell gave false testimony "*for money*" he should second our request that this Court recommend that the Department of Justice investigate the perjury committed in this case. Certainly perjury has been committed on one side or the other, and the guilty parties, whoever they are, should be punished.

Regarding the matter in *dispute* in the Dunkley-Beekhuis Interference, opposing counsel, at page 48 of the "Reply Brief of Appellee," state:

"It will be seen from the foregoing that the issue of priority of invention was involved in the interference and that 'all the tribunals of the Patent Office' decided that issue in Dunkley's favor. This demonstrates the error of our adversaries when they say that such an issue was not involved in the interference. The sum and substance of the interference matter is that Beekhuis was defeated on the question of fact as to priority of invention and then resorted to the technical expedient of contending that, although Dunkley was the prior inventor of the peeling jets, he was disentitled to make the claims because of an insufficient disclosure thereof in his original specification. This was the last resort of a badly defeated litigant, which ultimately went the way of the other issue."

The foregoing is merely another example of opposing counsel's reckless disregard for accuracy of statement.

By reference to page 6 of the Dunkley Interference Record, on file with the Clerk of this Court, it will be seen that, *prior to the taking of any testimony* in said interference, Beekhuis, in October, 1909, moved to dissolve the interference "*on the ground that the party Dunkley has no right to make any of the claims constituting the issues of the interference.*"

It, therefore, appears that the "*first resort*" of Beekhuis was the contention that Dunkley was not entitled to make the claims in issue in the interference. It, therefore, appears that opposing counsel is incorrect in stating, regarding such contention, that: "*This was the last resort of a badly defeated litigant, which ultimately went the way of the other issue.*" Said statement is purely imaginary. No testimony was taken in said interference until 1910 and, at the time of making said motion to dissolve on said ground Beekhuis was not "a badly defeated litigant."

After the taking of the testimony in said Interference, Beekhuis consistently contended, throughout all of the tribunals, that:

1. Dunkley was not entitled to make claims calling for "peeling jets" because of an insufficient disclosure in his application, as filed, of any such "peeling jets," *within the peculiar meaning given that expression by Beekhuis.*

2. That the brush-spray machines built by Dunkley, to wit: the first one-line model machine and the later three-line commercial machine, did not embody any such "*peeling-jets*."

As stated at page 26 of our opening brief, Beekhuis did not dispute or attack Dunkley's story of having built his first one-line model machine in 1903 and of having later built the three-line machine. Beekhuis merely contended that, in said machines, the "*brushes*" did the peeling and that the "*sprays*" therein were not "*peeling jets*." Therefore, the tribunals of the Patent Office and the Court of Appeals for the District of Columbia, were not required to pass on any *dispute* as to whether or not, in July, 1903, Dunkley made his first one-line model machine. The only "dispute" or real question in issue was whether or not said model embodied "*peeling jets*." That Beekhuis did not *dispute* the building of Dunkley's first machine at the time stated by him, is shown by the statement of Messrs. Chappell and Earl in their brief filed before the Commissioner of Patents, as follows:

"First, that Dunkley had produced *his machine* long before Beekhuis' conception. That has already been decided by the Examiner-of-Interferences and by the full membership of the Board of Examiners-in-Chief. *In fact it could not be decided otherwise without completely overruling the undisputed testimony.*"

In our opening brief, we accurately and correctly

stated the precise questions passed on in the said interference. At page 26 of said brief, we said:

"In other words, Beekhuis' attorneys, throughout the interference proceeding, assumed the story of Dunkley to be true in regard to his conceiving and making a '*brush machine*' but they contended that in such '*brush machine*' the water spray was not *the* means for removing the disintegrated skin or peel. In that regard, it is to be noted that the Court of Appeals for the District of Columbia expressly decided that, in the Dunkley machine, the water-spray or jets were not *the* means or *only* means of removing the skin, *but that the same merely cooperated with the brushes in performing such function.*"

Opposing counsel, by saying "*priority of invention was in dispute*" in said interference evidently wishes to convey the impression that Dunkley's story of having built his machines *at the times stated*, was disputed by Beekhuis and, therefore, the decision of the Court of Appeals for the District of Columbia is entitled to weight in the determination, by this Court, of the question of the dates of building said machines. Of course, priority of invention is involved in every such interference proceeding. The purpose of an interference proceeding is to determine who is the prior inventor. However, the determination of the issue of priority does not necessarily involve as a matter in dispute, the *date of building* of his first machine by one of the parties to the interference. The building of said machine at the date specified

may not be disputed even though, as in the Dunkley-Beekhuis interference, the opposing party may dispute the proposition that such machine, *admittedly built at such date*, embodies the invention described in the counts of the interference.

In view of the foregoing, the various decisions in the Dunkley-Beekhuis Interference are of no weight in determining the *date* when Dunkley's first *one-line* model machine was made. The *alleged date*, of the building of such machine, was not disputed or attacked by Beekhuis.

However, the decision of the Court of Appeals for the District of Columbia in said interference is absolutely controlling in respect to the *proper construction* to be placed upon the Dunkley "peeling-jet" claims in issue in the case at bar. Those claims were allowed to remain in the Dunkley application upon the expressed understanding that the "*spray*" in the Dunkley machine was *not* to be considered *the* "peeling-means" but was to be considered as merely co-operating with the action of the "*brushes*" in *brushing* or, as opposing counsel express it, in *scrubbing* the fruit, for the purpose of removing the dis-integrated skin. As that Court said:

"But let it be conceded that Dunkley was not fully aware of the effective action of the jets of water and *relied chiefly upon the action of the brushes to remove the skin*; * * *. The counts of the issue are satisfied by a construction in which peeling water jets *enter into the operation of re-*

moving the skins whether they be exclusively employed to remove the skins or not. *And in neither machine as described and constructed are the water jets shown to be the exclusive means of peeling."*

As heretofore stated, that Court treated the expression "water-spray," as used in Dunkley's application as filed, to be the equivalent of the expression "water-jets" as used in the Beekhuis patent.

At page 184 of our opening brief, we drew attention to the fact that the Vernon patent was issued for a "*process*" and not for any "*machine*." Due to said fact, the apparatus or machine, adapted for use in carrying out the process, is not therein described in detail and is merely indicated in the drawings without any attempt to show the details thereof.

However, for the purposes of opposing counsel's argument, it was apparently necessary to have the Vernon patent *be* for a "*machine*" and therefore, it *is* for a "*machine*" according to his statement at page 75 of his reply brief. He there states:

"After designing and constructing said *machine* he (Vernon) immediately proceeded to apply for a patent *thereon*."

Of course, the foregoing misrepresentation is of little importance, but *many little misrepresentations make a mighty misleading case*. And the briefs filed by opposing counsel simply abound in misrepresentations, both big and little. Many of these will be considered in the succeeding chapters hereof.

IV.

VERNON MACHINE PROVED AN ANTICIPATION BY
UNCONTRADICTED TESTIMONY.

The following list includes all the witnesses who testified regarding the Vernon machine:

Plaintiff's Witnesses.

Mark E. Fontana	Record page 470
T. B. Dawson	" " 632

Defendants' Witnesses.

H. G. Baker	" " 100
R. B. Way	" " 124
J. B. Cobbey	" " 146
S. R. Combs	" " 170
Newton Lushbaugh	" " 181
John W. Hickey	" " 197
E. H. Kennedy	" " 393
Edward F. Lambert	" " 412

In view of plaintiff's failure to call, as a witness, Robert I. Bentley, General Manager of the California Fruit Canners Association, his affidavit, regarding the Vernon machine, should be considered, under authority of *American Bell Tel. Co. v. National Tel. Mfg. Co.*, 190 Fed. 1018, cited in our opening brief.

Plaintiff's witness, Fontana, never saw the Vernon machine *in actual operation* at the Fresno plant of the California Fruit Canners Association, but he did see such machine at times other than during a peach

season. Regarding said Vernon machine, Fontana testified:

"MR. CHAPPELL—Q. Please state what you found there as a peach-peeling machine at that time?

"A. *Something very similar to what I see in front of me now.* (NOTE. Plaintiff's Exhibit No. 6, Model of Dunkley "brush-spray-pipe skin-removing means" was in front of witness and was the device referred to by him.)

"Q. Will you please describe in your own language what it was?

"A. There was a conveying belt where women would split the fruit and the belt went into a scalding or *grass-hopper*, as we then called it, with a solution for peeling peaches, or to loosen the skin; from there it dropped into two tanks of water, and it was conveyed from those two tanks into what we called a brush-machine, *which looked very much like the machine in front of me now.* (Second reference to model of Dunkley machine.)

"Q. That is a pair of brushes?

"A. A pair of brushes, and a small belt to assist the peaches through those brushes.

"Q. What was the water supply to this machine, and how many pipes did it comprise?

"A. There were two pipes through the machine—there were either three or four brushes, there were *two belts*, and there was a *pipe*, that is *between each of those two brushes.* (NOTE. This Vernon machine, one of the enlarged ones, being a *two-line* machine having two carrier belts.)

"THE COURT—There was a double installation?

"A. There must have been a double installation, and there were very small perforations in these pipes; the pipe must have been about $\frac{5}{8}$ ths or $\frac{3}{4}$ ths of an inch pipe" (R. 471).

The foregoing shows that said Vernon machine embodied *every mechanical element* of the Dunkley machine. The scalding or "*grasshopper*" constituted the "*skin disintegrating means*" and, as said by the witness, the peaches were conveyed through the solution therein. The witness also says, the "*skin-removing means*" *was like the model of the Dunkley machine*, that is, said means consisted of a carrier belt for conveying the peaches between two rotating brush rolls and *under a perforated water pipe* between said brush rolls.

At this point we ask:

What is there said, in the Dunkley patent, which, in any material way, or in any material particular, differentiates said Vernon structure from the Dunkley machine, therein described?

Absolutely nothing.

Plaintiff's witness Dawson, ever since 1899, has been the Assistant General Superintendent of the California Fruit Canners Association. He was the *only* witness called by plaintiff who ever saw the Vernon machine in operation at the Fresno plant of said association. Regarding said machine, so used at Fresno, Dawson said:

"Q. Who installed the machine there, if you know?

"A. At Fresno, Mr. Vernon, in 1902.

* * *

"Q. What became of the machine there installed?

"A. We used it I think *two years*, I don't know what became of it eventually" (R. 633).

Regarding the presence of the "*spray*" action in said machine, Dawson said:

"* * * the brushes had *sprays of water* playing on them" (R. 634).

Mr. R. I. Bentley, General Manager of the California Fruit Cannery Association, stated, in his affidavit regarding said Vernon machine as used in 1902 at Fresno, as follows:

"The machine was provided with a conveyor for conveying the peaches from an alkaline bath onto the endless carrier and thence by means of the endless conveyor carried forward between the brushes. As the peaches progressed through the machine, and between the brushes, they were directly subjected to the *jets of water* issuing from the perforations in the pipe under water main pressure and were also turned and moved by the brushes, the brushes and *water-jets* together serving to remove the skin which had been previously treated to the alkaline bath" (R. 217).

As there is no question raised as to the presence of the "grass-hopper" or lye-tank, in said Vernon machine, we shall refer only to the testimony relating to the "*brush-spray-pipe skin-removing means*" in the Vernon machine *as the same was used at Fresno in 1902*.

H. G. Baker testified as follows:

"Q. What kind of a machine was that?

"A. It was a machine built along the lines of this last patent, having two brushes and a belt through the center of it to convey fruit through it, and a *spray-pipe* above to direct water onto it, and operated by power (R. 103).

"Q. Now, you say you were called up there to see if you could give this machine more capacity? Please explain what you meant by that and what if anything you did?

"A. The capacity simply meant that they *would get more fruit through the machine in a given time*; what I did to accomplish that end was two or three things. Do you wish me to tell what these things were?

"Q. Yes.

"A. This belt conveyor could be adjusted up or down as regards axis of the brushes, and *by raising that belt-conveyor it brought the fruit so high on the brushes, that they did not act so much upon the fruit*, and, therefore, would not retard the progress of the fruit through the machine so much, and more fruit would go through on that account; by putting the brushes *a little wider apart* more fruit could pass through because they *would act less* upon it.

"Q. Now in that washer that was so installed——

"A. Then one other thing we did; when that machine was sent up there from the shop the brushes rotated in opposite directions, both inward and downward on the conveyor, and I shifted one of the axis on the front end of the machine so that they *both revolved in the same direction*, and that also *turned the fruit and let it go through much faster*" (R. 106).

It will be noted the foregoing changes, made within a few days after the first installation of the machine

not positive which, and it was perforated on the under side, and that made the *spray of water* which washed the peeling from the peach as the peach passed through between the brushes" (R. 127).

Regarding the substitution of an iron pipe for such tin pipe, and the installation of a pump about three weeks after the machine was first used, Way said:

"Q. How did they come to put in a larger pipe?

"A. Well, the larger pipe was put in there at the same time that the new lead was put in, to correspond with more water.

"MR. LYON—You say a new lead was put in, what do you mean by that exactly?

"A. The supply pipe to furnish the *spray*.

"Q. What means, if any, did you have there for supplying the pressure after that, to this machine?

"A. We changed it in, say, probably two or three weeks after we started, and when we put this iron in, *we connected a pump to the main*.

"Q. What was the purpose of that pump?

"A. *For pressure, an even amount of water*" (R. 130).

Plaintiff's own witness Fontana corroborates the statement that said pump was installed. He says:

"Q. Did you find any pump there when you went there?

"A. Yes.

"THE COURT—Q. Attached to the line?

"A. Attached to the line, yes" (R. 473).

The witness Newton Lushbaugh testified as follows:

"A. In the season of 1902, they were brushes

I should judge close to 4 feet long, possibly somewhere in the neighborhood of a 6-inch brush; that is, the diameter of the brush was 6 inches, placed on a slight incline with the peaches or fruit coming to the brushes at the highest point, and with a belt, an endless belt arranged directly between the brushes and below the center to carry the peaches on through until they were discharged from that machine; *and also over the belt and between the brushes*, I could not say how high above the brushes positively, *there was a pipe*; at first the pipe was made of galvanized iron or tin; I don't exactly remember which, but later we had occasion to change this and made it out of common gas pipe, *and this pipe was perforated with three rows of holes*; one row of holes directed down and the others possibly at an angle like that (illustrating); *there was water forced through that pipe playing on the brushes and on the fruit.*

* * *

"MR. LYON—Q. Do you know to what extent that machine was used that season?

"A. *We used it on I think practically the entire output of the season.*

"Q. In what form were the peaches put through this apparatus and process?

"A. *At first we experimented with that, that is, putting the peaches through whole; that was only the start; after that the peaches were cut in half and pitted before they went into the machine*" (R. 182).

The witness Hickey said:

"A. * * * and this little elevator from this trough carried them up and dropped them into a kind of apron or chute that slid them right down on these brushes, the brushes revolved around and they passed through that; there was a little belt

that run between the revolving brushes that helped carry the peaches through so as to keep them turned and clean the peaches; *over these brushes we had a pipe, perforated pipe, spraying water over these brushes and peaches to clean them*
 * * *” (R. 201).

The witness Lambert, *unlike* the foregoing witnesses, had nothing to do with the construction or operation of the Vernon machine, he having been the warehouse man at the plant. He did not attempt to give any detailed description of the machine, but simply said:

“A. I remember the peaches being carried on a belt through a tank of some sort, of chemical perhaps; then through brushes in which *there was water coming down as they passed along*” (R. 412).

In view of the fact that plaintiff's own witness corroborates all of defendants' witnesses in respect to said 1902 Vernon machine comprising a lye-tank or “grass-hopper” and a “*brush-spray-pipe skin-removing means*” consisting of two revolving brushes, a belt for carrying the peaches between them and a perforated *spray-pipe*, from the perforations of which issued water, in the form of spray, that played on the peaches, we respectfully submit there can be no doubt as to the said machine being a *complete anticipation* of the Dunkley patent.

We also wish to direct the Court's attention to the fact that *plaintiff was in a much better position than defendant* to prove any fact pertaining to said Vernon

machine. It was used in the plant of a company that was, for all practical purposes, *a party plaintiff in this action*, because, as Mr. Bentley said, the interests of the California Fruit Cannery Association and of plaintiff were, so far as this litigation is concerned, *the same*. Therefore, if the testimony of defendant's witnesses was not true, plaintiff could have produced innumerable witnesses to contradict the same, as it had the backing of the California Fruit Cannery Association, and, therefore, the backing of all the officers and employees of that company.

At this point, it will be of interest to note what the Patent Office Examiner-of-Interferences said regarding the *actual Dunkley machine or part thereof* offered in evidence by Dunkley in the Dunkley-Beekhuis interference. The opinion of said Examiner appears at the end of our opening brief, and in it occurs the following statement:

"A consideration of the machine or portion of a machine offered in evidence serves only to increase the doubts as to whether Dunkley's device would operate as it is now claimed it operates. *All of the brushes are composed of comparatively stiff fibre and the spray pipes are provided with small openings of about the size of an ordinary pin, these openings being spaced about an inch and a half apart along the length of the pipes.* As previously stated, *the rotary brushes are about six feet in length* and these brushes are designed to act on the fruit as it is carried along by the conveyor brush. These brushes, it is now contended, serve principally to rotate the fruit and that the

jets perform the work of peeling the same. But it seems unreasonable to suppose that the brushes in Dunkley's machine were designed primarily for the purpose stated. *On the contrary, it appears evident from an examination of the exhibit that the fruit would be subjected to a severe action by the brushes which would perform the principal work in removing the softened skin.* If the brushes are intended merely to rotate the fruit, it is not understood why the force exerted by the brushes in rotating the fruit would not also be sufficient to peel the same and why the jets would remove the skin which was unaffected by the stiff fibers of the brushes. It is true that the spray pipes in Dunkley's machine are near to the fruit but the *jets are small*, and it is not believed that the mass of water in these jets would be sufficient to have *any appreciable action* in removing the skin which had resisted the peeling action of the brushes as they rotated the fruit. *It seems apparent, therefore, that Dunkley does not rely upon jets of water as the principal means for peeling the fruit but that his machine, as repeatedly stated in his record, is one in which the brushes remove the skin which is subsequently washed away by the jets or sprays."*

The foregoing *finding of fact* by the Examiner was not modified by the decision of the Court of Appeals for the District of Columbia. That Court says:

*"But let it be conceded that Dunkley * * * relied chiefly upon the action of the brushes to remove the skins; * * *. It is to be observed that none of the counts define the water jets as constituting the sole peeling means. The counts of the issue are satisfied by a construction in which peeling water jets enter into the operation of removing the skins whether they be exclusively em-*

ployed to remove the skins or not. And *in neither machine, as described and constructed*, are the water jets shown to be the *exclusive* means of peeling. * * * Dunkley passes his fruit between the *brushes* to assist in peeling."

In other words, that Court simply found, *as a fact*, that water jets or, as expressed in Dunkley's patent specification, water *spray*, would to some extent, at least, *necessarily assist* in removing the skin because such skin had been disintegrated and, hence, in a condition to be *easily removed* and, therefore, said spray or jets properly could be termed "peeling-spray" or "peeling jets." As said by that Court:

"The skin of the peach having been *disintegrated* by the action of the hot solution of lye, that is to say, *cut or broken and loosened from the pulp*, was, *to say the least*, as easily removed by one jet as the other."

It is to be noted that, according to the Examiner, the rotary *brushes*, in the Dunkley machine, offered in evidence in the Interference, were about *six feet* long. It is also to be noted that the carrier or endless belt in the Dunkley machine, was made up of *brushes* so that, in addition to said *six feet* of rotary *brush* surfaces, the *whole* peaches, put through the Dunkley machine, were also subjected to the *brushing* action of said carrier *brush* surface. Of course, such whole peaches cannot move through the machine at the speed at which the carrier *brush* belt moves because their progress is retarded by the action of the rotary *brushes*

in revolving and turning them. Therefore, all portions of the peach are *brushed*, or as opposing counsel express it, *scrubbed* by the more rapidly moving *brush* surface beneath them.

As said Dunkley brush belt was an endless belt that extended more than the length of the six-foot rotary brushes, it embodied a brush surface over twelve feet in length.

According to the witness Lushbaugh, the rotary brushes, in the Vernon machine, were "close to 4 feet long" (R. 182). However, for the sake of the argument, we shall assume they were as long as Dunkley's rotary brushes, to-wit, six feet. The Vernon carrier belt was not a "*brush-belt*" as in the Dunkley machine. In other words, the surface of the Vernon carrier belt was *smooth* and not intended to *brush*, or as opposing counsel express it, *scrub* the peaches. The only function of the Vernon carrier belt was to carry or convey the peaches along under the water *jets or spray* and between the rotary brushes. By reason of said *spray*, such smooth carrier belt was constantly wet and, therefore, necessarily slippery.

Therefore, in the Dunkley machine, *as actually built*, there was, *in addition to any corresponding brushing surface in the Vernon machine*, more than *twelve feet* of brushing or scrubbing surface, a considerable portion of which would necessarily come into brushing or scrubbing contact with the slower moving peaches thereon.

The foregoing *brushing or scrubbing action* of the

Dunkley *belt brush* is that due to the same moving under the peach at a speed greater than the speed of the movement of the peach through the machine.

We shall now consider the additional or increased *scrubbing* action of all the Dunkley brushes, due to the fact that the Dunkley carrier belt has a *brush surface*.

On the opposite page are cuts of a number of drawings made for the purposes of this argument and to illustrate the points now being discussed.

Figure I is a cross-section of two rotary brushes, a carrier belt having a *smooth* surface and a *whole* peach resting on the carrier belt.

Figure II is a cross-section of an ordinary *friction* drive consisting of two friction pulleys, the one driving the other by frictional contact therewith.

Figure III is a cross-section of two rotary brushes, a carrier belt having a *brush* surface and a *whole* peach resting on the carrier belt. (Note: This Figure III is substantially a reproduction of Fig. 5 of the Dunkley patent, but showing the rotary brushes of Fig. 6 thereof, because said brushes were the ones actually used.)

Figure IV is a cross-section of two rotary brushes, a carrier belt having a *smooth* surface and a *half* peach resting thereon. In dotted lines is indicated another half peach in one of the many positions in which it would get while being conveyed through the machine

and turned and flopped over again and again by the rotary brushes.

In Fig. I the rotary brushes B *tend* to rotate the peach P at their own speed, due to the frictional brush contact between the peach and brushes. This tendency is to approach the conditions illustrated by the elements of an ordinary friction drive, such as that illustrated in Fig. II, wherein the driving pulley X turns the driven pulley Y by means of the frictional contact between the respective surfaces thereof. In the absence of any resistance to its rotation, the *driven* pulley would be rotated at the same speed as that of the *driving* pulley.

Obviously, in Fig. I the peach P tends to rotate at the same speed as the brushes B, but falls short of that speed because of the *slight* resistance offered by the smooth surface of the belt C on which P rests. It is obvious that the brushing effect of B upon P may be expressed as the *difference* between their respective speeds of rotation. If P rotated at the same speed as B, there would be no slippage between their respective surfaces and hence no brushing action. If P were held stationary, there would be the maximum of slippage between the surfaces of P and B and hence a maximum brushing effect.

It follows, therefore, that any influence which offers resistance to the turning of the peach P, in the same degree increases the slippage between it and the brushes B and, hence, increases the brushing effect

of brushes B. It is obvious that such a smooth surface belt C, especially if slippery with water, would offer a minimum resistance to the turning of the peach thereon, and, therefore, such peach P would tend to rotate at almost the same speed as the brushes B, with the consequent result of a minimum brushing action or effect.

In Fig. III the *whole* peach P rests on a carrier belt C having a *brush* surface. Here, too, the *tendency* of the brushes B is to rotate the peach P at the speed of rotation of the brushes. That tendency is resisted by the surface C on which P rests, but in this case that surface is a *brush* which obviously offers a resistance many times that of a *smooth and slippery surface*. The *brush* surface C, therefore, by greatly retarding the rotation of the peach P, very largely increases the slippage between it and the brushes B, and therefore, *greatly increases* the *brushing* action of the brushes B.

In view of the foregoing, it is manifest that the *brushing action* of the rotary brushes B, in Fig. III, in connection with a *brush* belt C, is as much greater than the brushing action of the rotary brushes B in Fig. I, in connection with a *smooth, slippery* belt C, as the amount of resistance to the turning peach offered by the brush surface C is greater than that offered by the smooth, slippery belt C.

The foregoing, however, is not the only difference between the respective brushing actions of the two

devices, one having a carrier with a *smooth* surface and the other having a carrier with a *brush* surface.

In Fig. III, the peach P either turns or is prevented from turning by the *brush* surface C. If prevented from turning, the brushing action of the rotary brushes B would be at a maximum. If the peach P is slowly turned, being merely retarded by the brush surface C, the brushing action of the rotary brushes B is correspondingly reduced. However, with any turning of the peach P on the brush C, the *brushing* action of said *brush surface* C must be added to that of the rotary brushes B. The slower P turns on C, the greater is the brushing action of B. The faster P turns, the greater is the brushing action of C. In either case, the total brushing action is the *sum* of that effected by the rotary brushes B and the belt brush C. *It must be apparent that the total brushing action is greater than in the case where the belt C has a smooth, slippery surface.*

In view of the foregoing, it is apparent that the *maximum turning effect* with a *minimum brushing effect* of the rotary brushes could be obtained by having the carrier belt *smooth* and slippery, yet Dunkley deliberately provided his carrier belt with a brush surface which not only increased the brushing effect of the rotary brushes, but also increased, to a large degree, the total brushing or scrubbing surface in his machine.

To use the words of the Court of Appeals for the

District of Columbia, Dunkley certainly "*relied chiefly upon the action of the brushes to remove the skins.*"

Notwithstanding the foregoing demonstrable facts, the lower Court, in its opinion herein, says that in the Dunkley machine "*the brushes serve the subsidiary purpose of agitating the fruit and of turning it for the purpose of presenting its different surfaces to the jets of water to enable them to do the efficient work of cleansing the skin after its disintegration by the lye-bath.*"

The foregoing finding is all the more remarkable when one stops to consider that:

1. Some of the Patent Office tribunals found that the Dunkley brushes *so completely* performed the *entire* peeling function that Dunkley was not entitled to claim the water spray or jets as "*peeling spray*," or, in other words, that he was not entitled to claim that the "*spray*" in his machine did *any part* of the actual *peeling* work.

2. The Court of Appeals for the District of Columbia only allowed Dunkley to retain the "*peeling-jet*" claims in his patent specification because, in its opinion, the "*spray*" in the Dunkley machine would necessarily, to some extent, assist in or "*enter into the operation of removing the skins*" and, therefore, could be properly called or termed "*peeling spray*" or "*peeling jets*."

The foregoing remarks are based upon a comparison of the devices respectively illustrated in Figures I

and III. As stated before, Fig. III illustrates the Dunkley structure shown in Fig. 5 of the Dunkley patent, with the substitution therein of the brushes shown in Fig. 6 of the patent. Fig. I differs therefrom only in respect to the carrier belt therein having a *smooth, slippery* surface. In making said comparison, we assumed that *whole* peaches were being operated upon. After the first tryout of the Vernon machine, only *half* peaches were peeled by it.

The smooth surface carrier belt in the Vernon machine was from an inch and a quarter to an inch and a half in width (R. 116). The rotary brushes could be adjusted so as to leave a space between the periphery of each of them and the adjacent edge of the belt and they were so adjusted (R. 106 and 116). The diameter of the brushes was about seven inches, which included about an inch and a half of brush fiber or hair projecting from the wooden core (R. 113). *The belt was in a plane even with or slightly above the center or axis of the brushes.* (R. 131).

As said by the witnesses, the rotary brushes were put wider apart and the carrier belt raised so that the brushes would have less brushing effect and would and could do little more than simply turn or flop the half peaches over and over during their progress through the machine.

Figure IV, heretofore referred to, illustrates a cross-section of the Vernon rotary brushes and smooth surface carrier belt, *as described by the witnesses.* On

said belt is indicated a *half* peach in full lines and, in dotted lines, another half-peach in a different position on the belt. Said figure is drawn to a smaller scale than the other figures, because the diameter of the Vernon brushes was greater than that of the Dunkley brushes.

A mere glance at Figure 4 is sufficient to show that the brushes could do little more than *turn or flop* the half-peaches over and over during their progress through the machine. It is inconceivable that such half-peaches could be acted on by the brushes to an extent sufficient to remove the disintegrated skin therefrom without the active co-operation of the water spray or jets striking the peaches. The shape of a half-peach absolutely precludes the possibility of it being brought into brushing contact with the rotary brushes *to an extent or with uniformity of action* sufficient to rely on said brushes alone to remove the disintegrated skin and produce a merchantable product. *It is apparent that the successful operation of the Vernon machine necessarily depended, to a great extent, upon the peeling action of the spray or jets present therein.*

Plaintiff's own witness Dawson testified said "spray" action was present and that the Vernon machine was used two years, which proves it was a commercial success. In fact, it was such a commercial success in 1902, that the California Fruit Cannery Association,

in 1903, installed three more Vernon machines of a greater capacity each.

Furthermore, plaintiff's testimony conclusively demonstrates that, in such a peach-peeling machine, the brushes alone *cannot* remove the disintegrated skin to an extent sufficient to turn out a merchantable product. That a merchantable product was turned out by the Vernon machine in 1902 cannot be questioned. That fact is demonstrated. *Therefore, said fact, according to plaintiff's own showing herein, can only be attributed to the presence of the peeling spray or jet action in the Vernon machine. There is no other answer.*

As said by plaintiff's counsel, Mr. Chappell:

"The patent (Dunkley) indicates that the brush acts somewhat on the peach in abraiding the surface, but the principal work is done by the sprays, and the sprays are particularly claimed as instrumentalities in the claims involved herein, and they are the principal instrumentalities we can show, because the machine will not peel a peach if forsooth the sprays of water are cut off; if the machine is then run, *although the peach has been soaked*, it will not be peeled, the peach passes too rapidly for one thing for the brushes to act upon it; *but if it was run slowly* the brush would simply move the peel to another place on the surface, and it would not be gotten rid of; *it needs the active agency of a spray of water striking against the peach to dash the disintegrated peel from the surface of it.* It is also particularly necessary that the spray act upon the peach because of the *irregularities* in the surface of the peach, the brush would not reach the cavity around the stem, or the *irregularities* on the crease of the peach, all of

which are reached positively by the spray" (R. 56).

Plaintiff's witness Dawson said the "spray" action was present in the Vernon machine, and, as said by plaintiff's counsel, Mr. Chappell, "it needs the active agency of a spray of water striking against the peach to dash the disintegrated peel from the surface of it."

Mr. Chappell's statement was made in reference to *whole peaches*. The truth thereof is even more apparent in connection with the peeling of *irregularly shaped half-peaches*, as a glance at Figure IV will show. *Mr. Chappell's statement is corroborated by Melville Dunkley (R. 83).*

In view of the foregoing, we respectfully submit that the lower Court's findings regarding the respective modes of operation of the Dunkley and Vernon machines, are not only unsupported by the proofs, but are inconsistent with plaintiff's own proofs which themselves conclusively demonstrate the Vernon machine to be a complete anticipation of the Dunkley patent.

V.

PLAINTIFF'S PROOFS OF DATE OF INVENTION.

Under the above heading, opposing counsel discuss the Dunkley testimony herein and attempt an "*explanation*" of the vital conflict between it and the Dunkley 1910 testimony. The explanation will not hold water. In fact, to borrow the language of Sir

George Jessel, in *Ex parte Hall*, 19 Ch. Div. 580, it reminds one of a colander because it is "*so full of holes.*"

At page 56 of the "Reply Brief of Appellee," said explanation is thus stated:

"In giving the interference testimony the Dunkleys either referred to the completed operative machine including a lye-tank, *or they were honestly mistaken in saying that the frame work was built in July, 1903*, if such construction can be placed upon their testimony. Under the first theory there can be no pretense of a change of testimony. Under the second theory it is merely the case of an *honest mistake*, subsequently corrected by the discovery of record evidence. A witness is always allowed to correct an error inadvertently made, and it would be a very *harsh rule* to hold that such correction convicts him of perjury. We submit that there was in substance no change of testimony. Judge Van Fleet was of that opinion, and he had a *much better opportunity* to decide the matter than is afforded by a mere reading of this record."

The "*much better opportunity*" referred to by opposing counsel was undoubtedly the "*opportunity*" of listening to and being influenced by his gross misrepresentations to the effect that the interference testimony was the *same* as that given by the Dunkleys in this case, in respect to Model Exhibit No. 10 being built in 1902. The opinion of the lower Court indicates on its face that full credence was given by the

lower Court to opposing counsel's statement to such effect.

In the Interference proceeding, the Dunkleys were called on to give the *complete history* of the Dunkley invention involved in such interference, to wit: the Dunkley "*brush-spray-pipe skin-removing means*." In giving said *complete history*, neither they nor any other witness even remotely intimated that any model, machine or part thereof was used, bought or made prior to the period of William Brunker's employment at South Haven in 1903.

The two Dunkleys, in giving such alleged *complete history*, stated some sketches were made in 1902 but that the same had been lost. Reference to said alleged *lost* sketches shows that the Dunkleys were giving an alleged *complete history* of the Dunkley peeling machine.

Therefore, the Dunkley interference testimony to the effect that the model machine was made in 1903, cannot be explained on the theory that they misunderstood any particular question and thought it referred to the structure involved in the interference plus a lye-tank that had nothing to do with any interference count or issue.

In the Interference proceeding they were called on to give the *complete history* of the Dunkley "*structure*" which was particularly described in the questions as *only* comprising and *only* being the "means for removing the *previously* disintegrated skin."

In view of the fact that they were called on to give such "*complete history*" of the invention, they cannot now pretend they thought they were only asked the date of construction of Model Exhibit No. 10 *plus* an alleged lye-tank therefor and, therefore, did *not* say, mention, intimate or hint anything about the alleged construction of such Model Exhibit No. 10, in 1902, *without* such alleged lye-tank, *because they were not asked the question when such Model No. 10 was made exclusive of any such alleged tank*. They were asked such specific question, again and again and, also, *the whole line of questions* asked them called for a *complete history* of the invention.

*"It would be idle to say that his testimony at the second trial was not contradictory of his testimony at the first. The only explanation offered for the change of testimony is that the witness was not asked that question. This explanation is not true in fact. The witness was interrogated to the fullest detail concerning the whole matter within his knowledge. * * **

"This Court has gone its full length to protect the rights of jury trial against encroachment by the courts under any guise, and one of the rights of jury trial is the right to have the credibility of the witness determined by the jury. Generally speaking there are no limitations upon this rule, but there are limitations upon the application of it. The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the Court. This Court has seldom been confronted with a more marked case of the kind than is presented here. We are united in the opinion that it is our plain

duty to so hold. *To hold otherwise would make a farce of judicial proceedings.*

"* * * Defendant's motion to direct a verdict should have been sustained. Reversed."

The foregoing language is found in the opinion rendered in the case of *Graham vs. Chicago & Northwestern Ry Co.*, 143 Ia., 604, 119 N. W., 708. Said case was one for personal injuries. The plaintiff's intestate had jumped on a train, clinging to a dangerous position on a vestibule, and was brushed off as the train crossed a viaduct. Two companions, who were with him at the time, had been rescued by the train crew, and the negligence alleged consisted of the failure of the train crew to use proper diligence to rescue the deceased after (it was claimed) they had knowledge of his position of danger. One of the principal witnesses for the plaintiff was a companion of the deceased, by the name of Hoyer, who, on the second trial (from which the case was appealed) swore that after being himself rescued, he had seen the deceased on the outside of the train. His testimony on this point was material, but flatly contradictory of his testimony at the former trial, *when he had not mentioned that important fact*. His explanation was that, at the first trial, he "*was not asked that question.*" However, as the Court said, his explanation was not true. "*The witness was interrogated to the fullest detail concerning the whole matter within his knowledge.*"

Likewise, in the case at bar, the Dunkleys, in the Interference proceeding, were "*interrogated to the fullest detail concerning the whole matter within their knowledge*" and relating to the *complete history* of the Dunkley invention. And, in giving such *complete history*, neither of them even remotely suggested that any peach peeler or part thereof was made in 1902.

In *Baier vs. Camden, etc. Ry. Co.*, 68 N. J. L., 42, 52 Atl., 215, the Court, reversing a judgment entered upon a verdict for plaintiff in a personal injury case, said:

"There was a suit brought by the plaintiff for this injury, which was tried in 1898, and resulted in a non-suit. That case was not reviewed, but a new suit was brought which resulted in the verdict for the plaintiff now contested. On the first trial there was nothing in the testimony of the plaintiff's witnesses which showed that the boy jumped from the wagon as the result of a threatened collision with the car, or that he was forced to jump from the wagon by any mismanagement of the trolley car by the motorman. *The evidence of the same witnesses on the last trial is substantially different from what it was on the first trial. Such testimony is not entitled to any favorable consideration. The witnesses have either forgotten the circumstances, or have intentionally perverted the facts. There would have been no error in granting the motion to nonsuit.*"

In view of the fact that the Dunkleys, in the interference proceeding, were called on to give the *com-*

plete history of the Dunkley peach-peeling invention, it is idle to now say that they did not testify to the alleged building of the Model Exhibit No. 10 in 1902, because they were not asked or did not understand they were asked to state when said model, exclusive of any alleged lye-tank therefor, was built.

Such an attempted explanation of this change in their testimony reminds us of the case of *Angus v. Craven*, 132 Cal., 691. In that action, the plaintiffs took the deposition of Mrs. Craven. It came out that she claimed to have been married to Senator Fair; and she was asked when, where and how she married him, to which she replied that they were married on a given date in San Francisco and by a written contract. Later she applied for a family allowance in the estate, and in support of her claim of marriage said that she had been married in San Francisco on the date already referred to and by contract, *but she added that afterwards the marriage was solemnized before a justice of the peace in Sausalito*. When taken to task for not having so stated upon her deposition, she explained that *she had not been asked the question*.

This was supposed at the time to be the high-water mark of audacity; and we cannot believe there will be any more success here than there was there.

Apparently, opposing counsel was not quite satisfied with his attempted explanation of the Dunkley *change of testimony* based on the theory that, in the

Interference, they were only asked or understood they were only asked the date of construction of the Model Exhibit No. 10 *plus* a lye-tank (that had nothing to do with the structure involved in the interference) and, therefore, testified therein in 1910, that said model Exhibit No. 10 was made in 1903. We can well appreciate his dissatisfaction with any such explanation. *It is a challenge to human intelligence and human credulity.*

Opposing counsel, therefore, offers an alternative explanation of said "*change.*" He says: "Under the *second theory* it is merely the case of an *honest mistake* subsequently corrected by the discovery of record evidence. A witness is always allowed to correct an error inadvertently made, and it would be a *harsh rule* to hold that such correction convicts him of perjury."

Opposing counsel apparently thinks it would be a "*harsh rule*" to hold that such an alleged correction convicts the Dunkleys of perjury but that it would *not* be a "*harsh rule*" to give full credence to such alleged "*correction*" and, by reason thereof, *necessarily convict Campbell and Bruncker of perjury and* *plaintiff's* ~~plaintiff's~~ *representations of subornation of perjury.* However, we are not asking for the application of any *artificial rules*, whether they be deemed "*harsh*" or not. We are asking merely for an application of the *ordinary rules that govern human conduct.* The Dunkley testimony is so inconsistent with said last

mentioned rules that it is unworthy of credence. As said by the Supreme Court in *Atlantic Works v. Brady*, 107 U. S., 192:

“Interested as he is in the result of the suit, his own testimony cannot be allowed to prevail against a course of conduct so utterly at variance with it. *It may be true, but one cannot give it effect as against what he himself did and did not do without disregarding the ordinary laws that govern human conduct.*”

Regarding the necessity of said “*change*” to meet the exigencies of this case, opposing counsel, at page 53 of said brief, says:

“It is scarcely to be presumed that a witness would unnecessarily commit perjury. When perjury is committed it is generally in pursuance of a dire necessity required by some exigency of the case. There was no such necessity or exigency in this case, because July, 1903, was a sufficient date for plaintiff’s purpose. Hence there could have been no motive for perjury.”

There was, however, just such “*a dire necessity*,” just such “*an exigency*” in this case which required the said “*change*” in the Dunkley testimony in order for plaintiff to win. In fact, the lower Court’s decision is *expressly based* upon such “*change*” in the Dunkley testimony carrying back *a year* the date of the construction and first use of Dunkley’s first machine. In its opinion, the lower Court says:

“* * * that the plaintiff’s assignor conceived

this device and put it to use at a time *at least a year* prior to the time claimed by Campbell; and *as this is a question on which the case turns*, the result is that the decree must go for the plaintiff" (R. 699).

The "dire necessity" requiring such "change" in the Dunkley testimony arose out of the following facts:

Defendant had proved, beyond any doubt and by a mass of oral and documentary evidence, Grier's conception of the invention in the 1902 peach season, the commencement by Grier, in April, 1903, of two commercial machines embodying such invention, and the *completion* and *public use* of said two machines and the *sale* of one of them, as early as July, 1903.

The Dunkley Interference testimony was merely to the effect that Dunkley, Sr., in August, 1902, conceived the invention and, in September, 1902, told his son, Melville, about his *mental* conception of the invention and gave to him some sketches illustrating it, but these sketches were lost; and that he did nothing more until July, 1903, when a mere model of the invention was made. Under the well established principals of law set forth in our opening brief, said facts would be insufficient to constitute Dunkley the first inventor. Grier conceived the invention at least as early as Dunkley could hope to prove his own conception and Grier was the more diligent in commencing to reduce and in actually reducing the invention to practice.

Furthermore, in view of the proof of Grier's commencement of two commercial machines in April, 1903, the Dunkleys certainly appreciated the difficulty of winning the case by only attempting to prove a *mere disclosure* of the invention in 1902, by the father to the son. Proof of such fact could be only the oral testimony of father and son, both highly interested witnesses. They, therefore, obviously saw the necessity, the "*dire necessity*" of showing that Dunkley, Sr., did something, before Grier's machines were commenced in April, 1903, other than *merely telling* his son about a *mental conception* and handing the son some sketches *which were lost*.

The foregoing shows the presence of the "*dire necessity*" of changing their testimony in order to win and the interference testimony, as well as the testimony of Campbell, Brunker and Mapes herein, proves their "*changed testimony*" to be false.

According to opposing counsel's "*alternative explanation*," the Dunkleys, in 1910, made an *innocent mistake* of *one year* in respect to the date of construction of model Exhibit No. 10. Opposing counsel now ask the Court to hold that their testimony, *given six years later*, is sufficient to prove said date *correctly*, even though it is contradicted by Campbell, Brunker and Mapes; by Mapes' account book and by the testimony of the other witnesses in the interference!

What a remarkable coincidence that Verhage, a witness in the Interference, should have made the same

innocent mistake and testified Campbell made the wooden frame, Exhibit No. 10, in 1903!

What a remarkable coincidence that defendant's representatives were able to "hire" Campbell and Bruner to likewise testify Campbell made said wooden frame in 1903!

Certainly the high-water mark of audacity was not reached in the Craven case.

Regarding the Dunkley *change of testimony* to meet the exigencies of this case, the following authorities are pertinent.

In *Healy v. United Traction Co.*, 115 App. Div., 868, 101 N. Y. Supp., 331, it is said:

"Upon the former appeal it appeared from the record that plaintiffs' intestate attempted to cross in front of an approaching car when the car was only 35 feet from her. We were of the opinion that her attempt to cross under those circumstances was clearly unwarranted in the exercise of reasonable care on her part, and the plaintiff had failed to show that she was free from contributory negligence. The only witness of the accident has now changed his testimony and says that when she started to cross the track the car was from 75 to 100 feet from her. * * * *It amounts, however, to almost a denial of justice when a defendant's property can be taken solely upon the evidence of such a witness. * * * Especially is this so when the verdict must be sustained, if at all, upon a change in his testimony upon a material matter between two trials.*"

In *Fisher v. Central Vermont Ry. Co.*, 118 App. Div., 446, N. Y. Supp., 513, it is said:

*"We have, therefore, the plaintiff at the first trial directly contradicting the plaintiff at the second trial on a question of vital and controlling importance. * * ** In my opinion, in view of the irreconcilable variance between the two statements, the latter given, as it was, after plaintiff's mind had been illumined as to the nature of the testimony essential to a recovery, the plaintiff did not sustain the burden of proof on this branch of the case. This in the first instance was, of course, a question for the jury; but the verdict of a jury is subject to judicial review, and, when the Court can plainly see that the verdict rests on no substantial basis, such verdict should be set aside.

* * *

"It would be a disgrace to the administration of justice, if a court, charged with the responsibility of reviewing the facts, should be held bound by the verdict of a jury, when it is apparent that evidence has been deliberately changed, or added to, to meet the exigencies of the case as pointed out upon a former appeal."

On page 57 of said reply brief, opposing counsel say:

"But after all, how will the defendants dispose of the testimony of Harvey C. Schau?"

The 1910 testimony of the Dunkleys and of Verhage proves the Dunkley testimony to be false and, therefore, necessarily proves Schau's testimony to be likewise false. The testimony of Campbell, Brunker and

Mapes also proves Schau's testimony to be false. It is quite obvious that, if the Dunkleys were willing to give false testimony herein, they would not hesitate to persuade Schau to give false testimony. Furthermore, after the lapse of *thirteen years*, Schau, who was only a boy during the period concerning which he testified herein, was very likely easily persuaded to believe what the Dunkleys might assure him was the truth. He, of course, wished to serve them and his testimony shows he had no particular means of fixing the respective dates when the model machine and the first commercial three-line machine were built. Therefore, after said lapse of *thirteen years* and with no means of fixing any dates, Schau undoubtedly was perfectly willing to accept, as true, any statement made by the Dunkleys and possibly he believed what he testified to. As Caesar said some years ago:

"Quod fere libenter homines id, quod volunt, credunt."

However, on its face, the Schau testimony shows that he was just *one year* out in his statements.

Both Campbell and Brunker testified that the model machine was made in 1903 in the basement room adjoining the engine-room in the Dunkley South Haven factory. Verhage, in the interference, also said Campbell made said machine in 1903 and set it up in said basement room. Verhage testified as follows:

"Q. 10. Will you indicate about the time, so

near as you can remember, that the *first wooden frame* was made?

"A. In July, 1903.

* * *

"Q. 15. At what place in the plant was the machine set up?

"A. *It was first set up in the basement in the north wing.*

"Q. 16. Who set it up there, if you know?

"A. Mr. Campbell and myself" (Dunkley Interference Record, p. 95).

Schau says he saw such machine in such basement room in November, 1902. Of course, it was not in existence then. It was, however, in such basement room in November, 1903, and that was the time when he first could have seen it. About the same time, Mapes saw the machine in the same basement room (R., 639).

The balance of Schau's testimony conclusively proves he was just *one year out* in his dates. He says he saw one or more of said machines at the Kalamazoo factory of the Dunkley Company in July, 1903 (R., 515). The testimony of Campbell shows that the *second* machine, designated herein as the "*first commercial machine*," was not made until 1904, and that it was made at Kalamazoo; installed at the South Haven factory in August, 1904, and first used about September 1, 1904. It is quite obvious, therefore, that it was in July, 1904, and *not* in July, 1903, that Schau saw said machine at the Kalamazoo factory. The

said facts show Schau was just one year *too early* in all of his dates.

The testimony of Campbell and Brunker to the effect that the model machine was the *only* peach-peeling machine at the Dunkley establishment in 1903, and the testimony of Campbell to the effect that the *second* peach-peeling machine, to wit: the first commercial machine, which was a *three-line* machine, was not built or used *until* 1904, is corroborated by the interference testimony of the witness Newton. He said he worked in the Dunkley South Haven factory during the latter half of July and during August, September, October and part of November, 1903. During that period he saw the model machine there (Int. R., 118). Regarding the time, when he saw the *second* Dunkley machine, Newton said:

"Q. 38. What was the *second* machine that you saw, and did that differ in any way from the first?

"A. The principle of the machine was the same, but with *three times* the capacity.

"Q. 39. When did you see that machine working, *if ever*?

"A. *In 1904.*

"Q. 40. What pressure of water was delivered to it?

"A. *City pressure*." (Int. R. 119).

At page 59 of their reply brief, opposing counsel state:

"Another criticism made against the Dunkleys is that they produced no written records. But

counsel seem to have overlooked the testimony given by M. E. Dunkley at page 445 of the record, to the effect that in 1912, the Dunkley cannery was destroyed by fire and their records were lost."

Unfortunately for opposing counsel, the said statement of M. E. Dunkley is proved untrue, *so far as the loss of their records is concerned.*

The cannery destroyed by fire in 1912, was the South Haven cannery, *not* the main factory of the Dunkley Co. at Kalamazoo, where the Dunkleys lived. The South Haven Cannery was closed during the winter months or off seasons, and it was at the Kalamazoo factory that Dunkley's *first commercial machine* was built by Campbell during 1904. The tank therefor was made in Kalamazoo by the Clark Engine & Boiler Company of that city and, on January 30, 1904, it was delivered to the Dunkley establishment in Kalamazoo (R., 537). The "brush-spray-pipe skin removing means" of such machine was also made in 1904 in said Dunkley factory at Kalamazoo (R., 536-7). That the Dunkley Company records were kept at the main establishment in Kalamazoo, *the home of the Dunkleys*, is conclusively proved by plaintiff's production of Bruncker's letter and the Clark Engine Company letter. *The production of said exhibits proves the records of the Dunkley Company were not lost in the fire down at the South Haven Cannery.*

The failure of the Dunkleys to produce documentary evidence showing the purchase of the various

parts of the first two Dunkley machines, coupled with their failure to remember the names of the firms from whom said parts were bought and accompanied by their failure to remember the names of their employees who built or operated the first two peach-peeling machines, as well as their failure to remember many other facts and circumstances, make most pertinent the following remarks of the Supreme Court in *Luco et al. v. United States*, 64 U. S., 515:

“There are many more satisfactory tests of the truth of parol testimony than that of character of the witnesses. Where the facts sworn to are capable of contradiction, they may be proved by others not to be true; and when they are not, the internal evidence is often more convincing than any other. *A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it.* An unexperienced witness, whose willingness to oblige his friend exceeds his judgment, will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent cross-examination will generally involve the latter in a web of contradictions, which will be in a measure evaded by the other, with the answer that ‘*he does not recollect.*’ When many witnesses are produced to the same facts, and they contradict one another in material circumstances, they prove themselves unworthy of credit.”

Regarding plaintiff's failure to introduce corrobor-

ating *documentary* evidence, opposing counsel, at page six of "Brief of Appellee," says:

"The clear oral evidence of three witnesses should be sufficient. However, in place of any documents, a piece of *real* evidence, the frame work of the identical machine itself, is produced and identified in court. A document would have to be a drawing or some description of it. The real thing itself is much the better."

At times, opposing counsel's contentions might be considered simply amusing if one could overlook their affront to one's understanding.

There is no dispute as to the building, *at some time*, of Model Exhibit No. 10. Defendant's witnesses Campbell and Brunker testified that such model machine was built in September and October, 1903. The said model exhibit, therefore proves absolutely nothing *in dispute* in this case. *Said model is adaptable to whatever date may be assigned to it.*

As said in *Eck v. Kutz*, 132 Fed., 763:

"*But the complainant is a highly interested witness, and his son is not much better; nor does the cam cylinder prove anything by itself, however primitive, being adaptable to whatever date may be assigned to it. The earlier date contended for rests, therefore, upon the mere say so of the father and son, without any corroboration or convincing circumstance, which hardly fulfills the high degree of proof required when the date of an invention is material in order to escape anticipation. Clark Thread Co. v. Williamantic Linen Co., 140*

U. S., 481; *Westinghouse Electric & Mfg. Co. v. Saranac Lake Erie Light Co.*, 108 Fed., 231."

On page 66 of their reply brief, opposing counsel, after referring to a Patent Office interference proceeding between Dunkley and the witness Mapes, says:

"Thereafter, Dunkley gave no more machine work to Mapes. These facts serve to explain Mr. Mapes' attitude in this controversy."

The testimony, upon which said *positive* statement is based, is that given by Mapes and reads as follows:

"MR. CHAPPELL—Q. Did you do any work for the Dunkley Company after the cherry-pitter interference?

"A. I could not tell you; I could not tell you *whether I ever did, or not*" (R. 649).

There is no testimony to the effect that the Dunkley Co. stopped giving work to Mapes at any time. However, a little matter of that kind is of no importance to opposing counsel when he is endeavoring to discredit an opposing witness. We have already referred to his misrepresentation of the testimony given by Campbell and Brunker as a basis for his vituperative attack on them.

On page 65 of such reply brief, it is said:

"Again, when he (Brunker) was asked regarding certain dates, he said (R. 629):

"A. You see, I can't remember about the

dates; I can't give you any dates at all; the only dates I have tried to give you have been wrong.'

"And yet this man's testimony is relied on for proving facts beyond a reasonable doubt."

The witness Brunker very frankly admitted he could not fix *exact* dates and, therefore, throughout his testimony, only attempted to fix the date of any particular occurrence by stating its relation to other occurrences. At the very commencement of his direct examination, he stated:

"Q. State whether or not you at any time were employed by the Dunkley Company?

"A. Yes. I was employed at that time, yes; I was employed in the cherry season; I can't remember the date; they were packing cherries when I went there.

"THE COURT—Q. In 1902, you say?

"A. *In 1903.*

"MR. WHITE—Q. Where did you go to work for that Company?

"A. He sent me down to South Haven.

"Q. For what period of time were you working at South Haven for the Dunkley Company?

"A. Probably 4 or 5 months; I am not quite sure" (R. 598).

Fortunately for us, opposing counsel themselves fixed the exact dates of Brunker's term of employment by producing Brunker's letter to the Dunkley Company and dated June 12, 1903 (R., 610). Said letter sought employment and it was after the date thereof, that Brunker entered the Dunkley Company's employ.

Regarding the period of his employment, S. J. Dunkley said:

"Q. When did William Brunker enter the employ of the Dunkley Company and when did he leave it?

"A. I don't think he stayed over three or four months; he entered the employ sometime in June, 1903; that is my recollection" (R. 506).

Brunker says the first work he did was to help Campbell install some can seaming and vacuum machines (R. 609). He next helped Campbell build the eighty-odd-foot table at which the women could sit while peeling peaches *by hand* (R. 599). (Note: In our opening brief, we directed attention to the fact that the building of said immense *hand-peeling* table, in July, 1903, proved that the Dunkleys, *at that very time*, had *no* peach-peeling machine which would necessarily do away with *hand-peeling*.)

Brunker was then put to pickling peaches and it was *after* he commenced such work that Dunkley spoke to him about using the lye-process for removing the skins from such pickled peaches. Brunker then did his experimenting with a lye-solution and it was *after* such experiments, that the first suggestion was made by Dunkley that a machine be built to do the work of peeling in connection with the use of the lye-process. Thereafter, Campbell commenced work on the first model-machine (R. 600-601). *Brunker's narrative of the events and circumstances leading up to the build-*

ing of the peach-peeling machine, necessarily shows that the machine referred to by him, was the first one built, to wit: the one-line model machine.

According to Melville Dunkley, the Michigan peach season began in August (R. 420) and therefore Brunker's work of pickling peaches and his preliminary experiments with a lye-solution necessarily began during August, 1903.

In view of the foregoing, it is evident that Brunker's inability to fix *exact* dates in no way weakens his testimony. The *exact* dates, of the various events testified to by him, were fixed by *plaintiff's witnesses*.

The Court will note the unobtrusive manner in which opposing counsel runs in the statement that "And yet this man's testimony is relied on for proving facts *beyond a reasonable doubt*." Opposing counsel apparently thought that his use of the phrase "*beyond a reasonable doubt*" would create *some* impression but not an impression sufficient to make one pause to consider whether or not defendant was *actually* endeavoring to prove anything, *beyond a reasonable doubt*, by Brunker's testimony.

Of course, there is no burden, whatever, on defendant to prove anything relative to the date of Dunkley's invention. On the contrary, under the authorities cited in our opening brief, the burden is on *plaintiff* to prove that date *beyond a reasonable doubt*. Brunker's testimony was introduced for the purpose of showing

that plaintiff's efforts to prove said date *beyond a reasonable doubt* were based on false testimony.

However, it was only necessary for defendant to rely on Brunker's testimony to the extent of raising a reasonable doubt as to the truth of plaintiff's testimony regarding said date.

The raising of such a doubt is all that is necessary to render plaintiff's said proof insufficient.

In *Westinghouse Co. v. Saranac Co.*, 108 Fed., 222, it is said:

"The patent being anticipated, if the date of application be taken as the date of invention, the burden rests upon the complainant to satisfy the court that the invention was made at an earlier date. There is no presumption in favor of such a patent. The burden which rested upon the defendant in the first instance has been transferred to the complainant and it must furnish the Court with convincing proof that the anticipation has been anticipated."

In *Michigan Cen. R. Co. v. Consolidated Car-Heating Co.*, 67 Fed., 121, the Circuit Court of Appeals for the Sixth Circuit, through Judge Severns, Judges Taft and Lurton concurring, said:

"The evidence shows that the device, as patented, has been in public use for some time prior to the date of his application. If it be permissible, as contended, to maintain his patent upon evidence, dehors the proceedings in the patent office, that he made the invention at an earlier date than is to be presumed from his application and patent, so as to carry it back to antedate the public use,

the proof should be clear and unequivocal that he was the original inventor. Eagleton Manufacturing Co. v. West Bradley & Cary Manufacturing Co., 2 Fed., 774, 777; Rob. Pat. Sect. 1026, note 14, and cases cited. There is much evidence in this record upon that subject. Without going into detail, it suffices to say that we have serious doubt whether Cody was the original inventor of the device represented by this combination of his patent. If the evidence in its favor were fortified by the presumption of validity afforded by the patent in ordinary cases, we might think it right that that should turn the scale, and that this claim in the patent should be held valid. But the presumption does not apply in such circumstances and the burden of proof is on the other side. We do not think it is sustained."

Has plaintiff proved Dunkley's date of invention by *clear, unequivocal and convincing proof*?

Why, even opposing counsel, in his "*alternative explanation*" of the "*change*" in the Dunkley testimony, asks this Court to hold that, in 1910, *six years* before the trial of this case and *six years* closer in time to the occurrences testified to, the Dunkleys made an *innocent mistake* of *one year* in fixing the date of construction of Dunkley's first model machine; he then asks this Court to hold that the Dunkley testimony, given *six years* later, for the purpose of correcting said *innocent mistake*, is *clear, unequivocal and convincing proof* of the date of construction of the machine notwithstanding said testimony:

1. *Is directly and flatly contradicted by Campbell,*

Brunker and Mapes; by the entries in Mapes' account book; and by the testimony of other witnesses in the Interference.

2. *Is disproved by its own self-destructive inconsistencies.*

3. *Is disproved by its inherent improbabilities.*

4. *Is disproved by facts shown in the case beyond any question or dispute.*

5. *Is uncorroborated by any documentary evidence which, on its face, proves anything.*

6. *Is oral testimony given thirteen years after the occurrences testified to.*

7. *Is oral testimony of two highly interested witnesses—father and son.*

8. *Is oral testimony replete with "I can't remember" and "I don't know" answers in respect to the most important and vital surrounding facts and circumstances.*

9. *Is changed testimony to meet the exigencies of this case.*

On such character of testimony, plaintiff bases its prayer for judgments running into hundreds of thousands of dollars.

*"It amounts, however, to almost a denial of justice when a defendant's property can be taken solely upon the evidence of such a witness. * * **
Especially is this so when the verdict must be sustained, if at all, *upon a change in his testimony upon a material matter between two trials."*

Healy v. United Traction Co., Supra.

"The defendant having antedated the filing of the application by record evidence so convincing that it stands conceded, the burden is upon complainant to carry the date of invention still further back by evidence that convinces *beyond a reasonable doubt*. * * *

"The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt."

Dey Time Register Co. v. W. H. Bundy Recording Co., 178 Fed., 818.

VI.

THE GRIER PRIOR USE.

Under the above heading, the Grier proofs are discussed by opposing counsel, commencing at page 18 of their reply brief. The criticism thereof is so puerile as hardly to be deserving of answer. The said proofs amount to a demonstration. The oral testimony is fully corroborated by documentary evidence. The books of Grier's Company, Pasadena Canning Company, are in evidence and show all the transactions of that company from its very beginning in 1902. In our opening brief, we referred to the various items therein showing the various steps taken in connection with the building of Grier's first two machines. Notwithstanding the foregoing, opposing counsel again and again remarks that Mr. Grier's testimony is based on *mere recollection*.

The said books show that, *at least* as early as July 30, 1903, the Grier machines were completed, because, on that date, there was entered in the books a charge, for one of said machines, against the East Side Canning Company, to whom it was sold (R. 309).

The Eastside Canning Company, at least as early as August 1, 1903, put the Grier machine into actual operation. Mr. Taylor, of that company, testified that the machine was in operation for two or three days before he bought the pump therefor from the Baker Iron Works (R. 381).

The *original bill* for said pump is in evidence and shows that the pump *was delivered August 3, 1903* (R. 382).

Opposing counsel says, at page 22 of the reply brief, that: "It is quite evident from the foregoing " that the use of the East Side Canning Company's " machine was after the installation of the pump . . ." notwithstanding Mr. Taylor expressly said the machine was used for two or three days prior to such purchase and *that it was such use that disclosed the necessity of having a pump to give more pressure* (R. 381).

Finley referred to a partition about the Pasadena Canning Company's machine in 1903, but the testimony of Grier and Lusby shows that such a partition was not put up till 1904, and that Finley was, therefore, mistaken as to the date of its erection. Whether it was or was not there at any time is abso-

lutely immaterial, but opposing counsel is forced to grasp at straws. Regarding the erection of such a partition in 1904, Grier says:

"A. 1904; and once in a while that lye-tank would boil over, and to protect them a fence was put around there to keep the splash from coming out and scalding anyone" (R. 337).

On page 35 of the reply brief, opposing counsel indulges in an attempt to mislead so puerile as to be positively pitiful. He says:

"We do not lose sight of the fact that some book accounts were offered in evidence by the defendants, presumably for the purpose of fixing dates; but they are insufficient. They are copied at pages 296-7 of the record, the material ones appearing on page 297. The first item is under date of May 29, 1903, and consists of a charge against the East Side Canning Co. for what is designated there as 'Tool & Fix. \$278.00.' This entry fails to identify anything with sufficient clearness to enable us to know what it covers. It would appear to refer to tools and fixtures, but what those tools and fixtures are is not apparent from the entry itself. Certainly there is nothing in the entry to show on its face that it refers to a peach peeling machine. Grier says it refers to grasshoppers; *but that is merely his recollection*, and furthermore such grasshoppers had been used for scalding tomatoes for many years."

The first *two items* on said page 297 of the record herein, read as follows:

(Journal page 38)	May 29, '03.
194 East Side C. Co.	278.00
20 Tool & Fix.	278.00

(Ledger page 194)	
1903	East Side Canning Co.
May 29 Scalders 38	278.00 (Other Items)

The first item is the *journal* entry and the second item is the *ledger* entry of the *same transaction*. It is obvious that a double entry system of books was kept by the Pasadena Canning Company, and, in such a system, certain accounts are opened and debited or credited according to the nature of any particular transaction. It is perfectly obvious, that the Pasadena Company kept one account under the name of "tools and fixtures" account. In the said journal entry said account is credited with the sum of \$278.00 and the Eastside Company is debited with the same amount. The same transaction is carried forward into the *ledger*, where it is seen that it was a "*scalders*" or "*grasshopper*" that the Eastside Company was charged for on May 29, 1903. It will be noted that, in the *journal* entry, appears the page of the ledger to which the entry is carried forward, to wit: page 194. In the *ledger* entry appears the journal page from which the entry is brought, to wit: page 38.

We might take a charitable view of the foregoing

Fig. 1

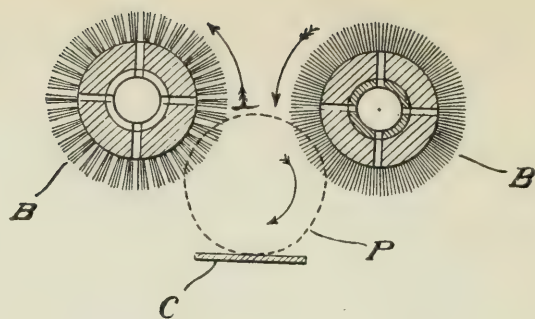


Fig. 2

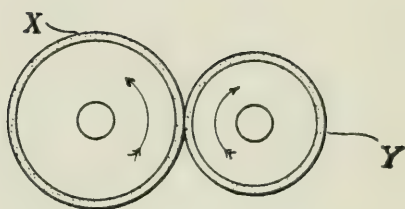


Fig. 3

DUNKLEY

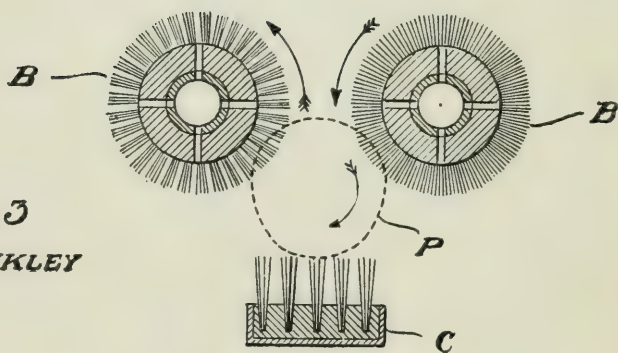
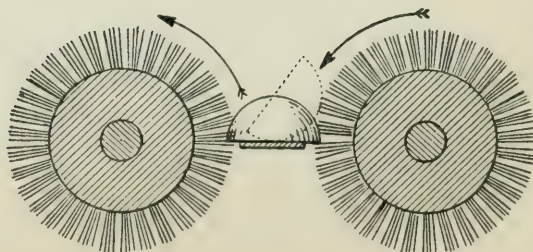


Fig. 4

VERNON



and attribute opposing counsel's remarks merely to his ignorance of bookkeeping. However, it is impossible to believe he overlooked the *second* item on said page, because, after indulging in the foregoing remarks, he immediately discusses item number *three* on said page of the record. The second item is *too plain and clear* to have been overlooked "in the seclusion of his office" and in the absence of "the heat of verbal debate."

Query—If the plaintiff-appellee has a meritorious case, why is so much misrepresentation deemed necessary in the presentation thereof?

VII.

DEFENSE THAT NOT DUNKLEY BUT GRIER ORIGINAL AND FIRST INVENTOR.

Commencing at page 35 of our opening brief, we discussed the above specified defense. Section 961 of *Robinson on Patents* very clearly points out the essential features of such a defense. Said section reads as follows:

"Sec. 961. Third Defense: Denial That The Alleged Inventor Was The First Inventor of The Patented Art or Instrument.

"The third defense consists in a denial that the patentee or his assignor performed the inventive act producing the alleged invention *at an earlier date* than any other inventors *in this country*. This defense concedes that the patentee or his assignor is a true inventor of the art or article in

question, but *denies that he was its first inventor*. It is equivalent to *either of two averments*:

“(1) That rival inventors had completely *conceived* the idea of means embodied in the invention, and were using *due diligence in reducing it to practice at the time* the patentee or his assignor *conceived* the same idea; or

“(2) That although the patentee or his assignor had *first conceived* the idea he did *not use due diligence in reducing it to practice*, and that in the meantime some *later conceiver but more prompt reducer* had perfected the invention.

“This *defense* raises the *same issue* which is presented in interference cases in the Patent Office and in proceedings in equity to annul a rival patent, and is *sustained when the evidence establishes either one of its equivalent averments*.”

The foregoing, is a very clear statement of the matters to be proved in sustaining the defense that the patentee was not the *original and first inventor* of the invention covered by his patent. Our patent laws do not provide for the issuance of a patent to one *other* than the “*original and first inventor*.”

If a patent be issued inadvertently to one *not “the original and first inventor,”* it is void.

Therefore, Section 4920 of the Revised Statutes specifically provides that one of the defenses to a patent suit is that the patentee “*was not the original and first inventor*.”

Among other things, said Section 4920 provides:

“In any action for infringement, the defendant may plead the general issue, and, having given

notice in writing to the plaintiff or his attorney thirty days before, may prove on trial one or more of the following special matters:

“Fourth. *That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented.*”

As Mr. Robinson says, you can prove the patentee is not the “*original and first inventor*” in two ways:

1. The patentee is *not* the first inventor, if another inventor, in this country, *conceived* the invention *first* and, although *second to reduce it to practice*, used due diligence in so reducing it to practice. [Note: The *due diligence* is necessary in order to connect up the *conception date* with the *reduction to practice date* so as to entitle the inventor to his *conception date* as the *date of his invention*.]

2. The patentee is *not* the first inventor, if another inventor, in this country, *conceived* the invention *second* but *reduced it to practice first*, the patentee *not* having used *due diligence* in *reducing his invention to practice*. [Note: In this instance, the patentee is not entitled to his *conception date*, as the *date of his invention*, because he does *not* connect up his *conception date* with his *reduction to practice date*, by *due diligence*.]

The foregoing principles are well established and there is no difficulty in applying them, notwithstanding the strenuous efforts of opposing counsel, in re-

spect thereof, to create "*confusion worse confounded*." Their argument on this phase of the case is of the cuttlefish type.

On page 68 of their reply brief, they even go so far as to use, as one of the topic headings, the words: "Defense of Surreptitious Patenting," as though we, in our argument of this case, were relying on such a defense.

In line with Mr. Robinson's remarks regarding the defense that the patentee is not the *original and first inventor*, it is stated as follows in 30 Cyc., at page 873 thereof:

"First Inventor. The first inventor is the one who first has a mental conception of the invention, *provided he exercises diligence thereafter in adapting and perfecting it*, but as against a rival claimant who first reduces the invention to practice the *burden* is upon the *first conceiver* to show *diligence*. The party first to reduce to practice is *prima facie* the first inventor, but the man who *first conceives* and in a mental sense *first invents* a machine, art or composition of matter *may date his particular invention back to the time of its conception, if he connects the conception with its reduction to practice by reasonable diligence on his part so that they are substantially one continuous act*."

In view of the foregoing principles, it is apparent that:

1st. *If Grier first conceived and first reduced to practice, he is, of course, the first inventor without*

regard to the question of diligence, and in such case the Dunkley patent is void.

2nd. *If Grier first conceived but was second in reducing to practice, he is still the first inventor, provided he used reasonable diligence in reducing to practice, and in such case the Dunkley patent is void.*

3rd. *If Grier was the second to conceive but the first to reduce to practice, he is still the first inventor, provided Dunkley did not use reasonable diligence in reducing to practice, and in such case the Dunkley patent is void.*

The proofs conclusively show that Dunkley had *no conception* of the invention until after the commencement of the Michigan peach season in August, 1903, when he *first* discussed the lye-process with Brunker after the latter had been working a short time in pickling peaches. As the Grier machines were completed in July, 1903, and one of them actually sold during that month to the Eastside Company, it is quite apparent that Grier was the *first* inventor.

Even if Dunkley be accorded August, 1902, as his date of conception, nevertheless Grier would still be the first inventor, as Dunkley was not diligent in reducing the invention to practice, he having allowed two peach seasons to go by without making a commercial machine. It is recalled that Dunkley's

first commercial machine, to wit: the *three-line* machine, was not built until 1904 and was first used during the 1904 peach season. The making of a "*model*" is not a reduction to practice. However, the Dunkley model machine was not completed until after October 6, 1903, practically at the end of the Michigan 1903 peach season.

In view of the foregoing, it is apparent that, from no point of view, could Dunkley be considered diligent in reducing to practice, even if he be accorded August, 1902, as his date of conception. However, no credence can be given plaintiff's proofs of any Dunkley activities prior to August, 1903.

Furthermore, plaintiff's proofs are insufficient to show Dunkley's date of invention antedated the *use* of the Grier machines.

At page 73 of their reply brief, opposing counsel say:

"Dunkley has exhibited unusual diligence, extending over a period from the date of his initial conception in 1902 to the issuance of this patent in 1914, a period of twelve years; whereas Grier has not only failed to show such reasonable diligence, but has been slothful and negligent. If he ever had any rights he has slept on them. Had he filed his application for a patent, he would have been thrown into interference with Dunkley, just as Beekhuis was, and the matter could have then and there been settled. On the contrary, he goes to sleep for twelve years and then suddenly awakes and claims rights of invention superior to those of Dunkley."

The foregoing remarks are nothing more and nothing less than arrant nonsense.

The only "*diligence*" involved is the "diligence" of reducing a mental *conception* of an invention to practice, that is, embodying such mental "*conception*" in a commercially operative device. Upon such *reduction to practice*, the inventive act is *complete* and the *conceiver* is thereupon *an inventor*. What he does thereafter is absolutely immaterial so far as concerns the question whether he *is* an *inventor* and so far as concerns the question of the *date* of his invention.

After reducing his invention to practice in July, 1903, Grier dedicated the same to the public by reason of his failure to apply for a seventeen-year patent monopoly thereof.

After reducing his invention to practice in July, 1902, Vernon likewise dedicated to the public the free use of the apparatus shown in his patent, by reason of his failure to attempt to patent such apparatus or machine.

We are not, in this litigation, asserting any rights of Grier other than his rights *as one of the general public* entitled to freely use the invention dedicated to such public by him in July, 1903.

His failure to apply for a patent subsequently to July, 1903, cannot alter the *fact* that, in July, 1903, he *completed* an *inventive act* and, therefore, in July, 1903, was *an inventor*. And the date of such *inven-*

tion does not depend on what he did *subsequently* to July, 1903. Said date is determined by two factors:

1. Date of his *conception*.
2. His *diligence* in reducing such *conception* to practice.

If he was *diligent* in so reducing his mental conception to practice, then the *law* accords him, *as the date of his invention*, the *date of his mental conception thereof*.

That Grier was diligent in reducing his invention to practice, is shown by the fact that, after conceiving the invention in August or September, 1902, he commenced building two commercial machines in April, 1903, and completed them in July, 1903, and, in July, 1903, sold one of them to the Eastside Canning Company. As said machines could only be used during a peach season, he certainly was diligent in getting them ready for commercial use during the very *next* peach season following that during which he *conceived* the invention.

Grier's date of invention is, therefore, September, 190²~~3~~, and there is nothing in the record that casts any doubt on the proofs of said date.

At page 45, of our opening brief, we discussed Section 812 of *Macomber on Patents*, which was cited by opposing counsel in the lower Court as sus-

taining their contention that, in proving prior invention by another, who had not applied for a patent, the defendant was limited to the *date of use* of such prior inventor's invention. In said discussion, we referred at length to the case of *Webster Loom Co. v. Higgins*, 105 U. S., 580, which fully sustains our contentions on this phase of the case. It is to be noted, opposing counsel avoid reference to such authority.

In support of his contentions, on this phase of the case, opposing counsel, Mr. Miller, cites no authority.

In support of his similar contentions, opposing counsel, Mr. Chappell, cites another section of Macomber, we having demonstrated that Section 812 of that writer's book, cited by opposing counsel in the lower Court, was inconsistent with and contradicted by the *Webster Loom Co.* case, attempted to be digested in such section.

The new section of Macomber, so cited, to wit: Section 808, has no bearing on the defense now being discussed by us. It does not pretend to relate to the defense that a patentee is not the *original and first inventor*, provided for in Section 4920 of the Revised Statutes.

As stated by the Circuit Court of Appeals for the First Circuit, in *Automatic Weighing Machine Co. v. Pneumatic Scale Corporation*, 166 Fed., 294:

“It is not uncommon for two persons to conceive an improvement in an existing device about the same time, and *all the law exacts of the first conceiver in order to protect him in his right to the invention is that he shall proceed with reasonable diligence, to reduce the invention to practice,* or to file an application for a patent in conformity with the statutes.”

It is to be noted that an inventor, in order to protect *his own* right to use his *own* invention is not required to file a patent application thereon. If he desires to *prevent others* from using it, he must secure patent protection.

But such first inventor is not required to apply for a patent on his invention, in order to prevent a subsequent inventor stopping him using it by means of a patent issued to such subsequent inventor. Such a patent is void, because not issued to *the original and first inventor* of the invention.

As stated in said decision, “*all the law exacts of the first conceiver in order to protect him in his right to the invention is that he shall proceed with reasonable diligence to reduce the invention to practice.*”

If such first conceiver so reasonably reduces his invention to practice and discloses it to the public, no subsequent inventor can deprive him or the public of the right to use the same, because such a subsequent inventor is not entitled to any monopoly thereof under the patent laws of the United States.

In said discussion, it is expressly stated that such first conceiver has a choice of two methods of protecting his *own* right to use his *own* invention, *one* of them being to reduce it to practice by the exercise of reasonable diligence, and *the other* being the filing of an application for a patent thereon.

Grier, by the exercise of reasonable diligence, reduced his conception to practice and disclosed and dedicated his invention to the public. No subsequent inventor can lawfully prevent Grier or the public from using such invention.

At page 49 of our opening brief, we quoted, at length, Section 383 of *Robinson on Patents*, but, through inadvertence, said author was not given credit for such quotation, in which is discussed the question of diligence in the reduction to practice of a mental conception of an invention.

CONCLUSION.

We respectfully submit that the decision of the lower Court should be reversed and these suits ordered dismissed.

Respectfully submitted.

WILLIAM K. WHITE,
FREDERICK S. LYON,
KEMPER B. CAMPBELL,

Solicitors and Counsel for Defendant-Appellant.

No. 2915.

IN THE
United States Circuit Court of Appeals *f*
FOR THE NINTH CIRCUIT

CENTRAL CALIFORNIA CANNERIES CO.,
Appellant,

vs.

THE DUNKLEY COMPANY,
Appellee.

REPLY BRIEF OF APPELLEE

FRED L. CHAPPELL,
JOHN H. MILLER,
Counsel for Appellee.

The James H. Barry Co.
San Francisco

Filed

APR 14 1917

S. D. Monckton,

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CENTRAL CALIFORNIA CAN-	}	In Equity No. 2915.
NERIES COMPANY, and others,		
<i>Defendants-Appellants,</i>		
vs.		
DUNKLEY COMPANY,		
<i>Plaintiff-Appellee.</i>		

REPLY BRIEF ON BEHALF OF APPELLEE.

By F. L. CHAPPELL.

PERJURY CHARGES AGAINST PLAINTIFF'S WITNESSES.

According to defendants-appellants' statements *all* of the witnesses on behalf of plaintiff-appellee have committed perjury, and defendants-appellants have asked that the machinery of the government be made use of to investigate these charges.

A reference to the opinion of Judge Van Fleet in the court below and a reference to the record shows nothing indicating anything of the kind nor any grounds for such statements. While we view it that

findings of fact of the court below are unassailable in this court, in view of the recent Supreme Court decision of *Adamson vs. Gilliland*, we feel, in view of the more or less fervid statements of appellant's counsel, like bringing such matters to the attention of the court in brief detail.

It is said that the Dunkleys are guilty because they have changed their testimony from that given in the Dunkley-Beekhuis interference. Also that Schau is a liar and a perjurer because he was only 19 years old, that being the only reason, or at least the best reason, assigned for charging Schau with the crime of perjury.

Defendants-appellants in their brief have printed the decisions of the Patent Office and of the Court of Appeals of the District of Columbia in the Beekhuis-Dunkley interference case. We find at p. 237 of that brief the solemn finding by the Court of Appeals of the District of Columbia:

“Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches.”

See the beginning of the paragraph at the top of page 237.

At p. 239 of the brief appears the statement of the Examiner of Interferences indicating that Dunkley conceived the invention a year in advance of Beekhuis, in August, 1902, and that he disclosed the same in September, 1902, while Beekhuis disclosed his in-

vention in July, 1903; and there is given as the date of reduction to practice by Dunkley, July, 1903, and Beekhuis, February, 1904.

This statement, which could not have been varied by the testimony in the Interference, because it is a pleading on which the interference was founded, is entirely supported by the evidence in the record before this court. The evidence in the Interference case, consisting of a large group of witnesses, shows that the first successful reduction to practice was in July, 1903. At that time the machine was completely organized and successfully operated.

The peach-peeling season is brief. Not much can be accomplished between seasons except to theorize and organize a machine for a test as soon as peaches can be obtained the following season. Dunkley was busy, not merely with this invention but with many others. He turned the matter over to his son who organized the structure and was able to peel a few peaches late in 1902 with a machine that was not completely organized. The peaches were poured into the machine from a pan and collected in a tub. The spray part was tested sufficiently so that he was very much impressed with it, and peaches were peeled with it.

In the April following, 1903, a lye tank was purchased, and the machine was organized. Harvey Schau saw it in Kalamazoo about the 4th of July, 1903, and immediately thereafter saw the whole thing

set up and in operation in South Haven, where it was operated through that season.

But, however, it was not until the season of 1904 that *all* peaches at the plant of the Dunkley Company were peeled by this method. A considerable part of the peaches canned by that company in South Haven in 1903 were peeled by hand or with a St. Clair-Scott machine.

It was the privilege of defendants-appellants to have introduced a certified copy of the record in the Interference to show what was proved there, if they wished to attack what was proved in this case, because of the alleged difference.

They did not offer that record. They attempted a sort of sharp practice by quizzing about an isolated portion here and another portion there, and they now wish to explain the very different things proven here from those which were proven in the Interference proceeding.

The proofs in the Interference proceeding are not here. Defendants did not dare to offer them in their entirety, because the numerous witnesses there sworn entirely support the dates that are fixed here, as counsel for defendants-appellants very well knows. However, plaintiff-appellee was not at liberty to prove its case in that way, but was obliged to bring three witnesses from Michigan, 2500 miles, for that purpose. It is submitted that three witnesses are entirely suf-

ficient. Two witnesses only are required in some criminal cases.

At this point we desire to protest against the course of defendants' counsel in constantly and continuously referring to matters which are not in the record. A particularly objectionable instance of this is the cut opposite page 134 of the brief, which purports to illustrate the friction gears and the manner of mounting them on the original Dunkley machine, Plaintiff's Exhibit 10. No such drawing was put in evidence. It is purely a mythical drawing, apparently originating in the imagination of counsel. We protest against its use here.

Plaintiff-appellee is savagely criticized for lack of documentary proofs. The real evidence, Plaintiff's Exhibit No. 10, the machine itself or so much of it as is left, is offered in evidence and identified positively by all three witnesses. An examination of that frame, Plaintiff's Exhibit No. 10, will show, as Campbell himself swears, that it was made of pieces picked up around the plant. Where, as there, a great variety of inventions was proceeding, much material would necessarily be on hand, and it would be quite impossible by the examination of bills and statements to determine just what the 4x4's were for, and an examination of the bearing boxes will show that they were not boxes purchased for this particular purpose, because the oil cup is pointed off at an angle, showing that material was picked up around the shop from

which to organize this structure, and there would be no bill. And had there been any bill, it would not have been specified that the material was for a peach-peeling machine.

Again, the plant of the Dunkley Company has been disorganized. All the peach trees in that region were killed by a severe freeze, and in 1907 it was necessary, as pointed out by Melville Dunkley, to ship peaches to South Haven for canning. When it is remembered that South Haven was the center of the peach-growing country of Michigan, this statement would be hard to believe, but it is the fact. Books and records had been scattered and were therefore not obtainable. The factory had burned. But, as above pointed out, if obtained they would likely show nothing as to the first machine, Plaintiff's Exhibit No. 10.

But it appears by S. J. Dunkley, by his son Melville Dunkley, and also by the witness H. C. Schau that immediately the first machine was tested in July, 1903, materials were purchased for other and larger machines, and it is quite likely that for those machines material would be especially purchased. All of which would be in accord with statements made by Stewart Campbell, as confirmed by Brunker. These were for the second machine, a three-line machine of large capacity.

The testimony of the witnesses that is criticized does not depart from the preliminary statement above

quoted, which shows long activity conforming to the statements that the invention was conceived in August, 1902. See the testimony of Melville E. Dunkley at R., p. 416. He tells of an experiment early in the peach-peeling season of 1902, and says:

"The machine such as outlined is practically the same as the one standing here, and we started in getting ready to put that machine together in the early part of 1902. The season, of course, was very busy and I was back and forth from Hartford so that the machine was not finished until toward the late fall of 1902; we got perhaps a few bushels of peaches through there using an ordinary galvanized tub and a basket of some kind to scald a few bushels of peaches in order to get work enough done to see whether the matter was going to be practical or not. We, however, were very well satisfied with the results and in the following spring we started to finish the machine, ordering the parts for the scalding, prevaricator we called it. That was built and set up with this first experimental machine at South Haven in the early summer of 1903. Later that year there was another machine built and put in operation."

On p. 418 the witness says:

"A. The first complete machine including the scalding and the peeler was operated in South Haven in 1903. The scalding was delivered in April, I believe, of 1903 and the machine was set up at South Haven as soon after that as we could get to it, and we started practical operations on that line as soon as the Georgia peaches came into the market at Chicago, which is usually early in July."

"Q. Then you would fix the date for the first successful operation as when?

"A. In *July, 1903*, for the commercial operation of the machine."

and the *spray part* of the machine was operated effectively "in the *fall of 1902*."

The date given by Melville Dunkley is fixed by a letter about the purchase of the tank, the letter being marked Plaintiff's Exhibit 8, and appears at R., p. 741. His testimony relative thereto appears at R., p. 467-8.

Samuel J. Dunkley confirms this. He says, R., p. 479:

"A. August, 1902, I told my son about the matter and we made some experiments and concluded it would be worth while to build a little experimenting machine to try it out; so I gave him the instructions and then the machine was finished and hooked up and we tried it; I put up some canned goods, a few cases and the next spring was satisfied that it was all right and then we went ahead and built the apparatus which is practically the same as at the present time.

"THE COURT—Q. The next spring, what year would that be?

"A. 1903. In *July, 1903*, the *apparatus was completed and tried out*—about *July 15*, that is, when the southern peaches got up.

"MR. CHAPPELL—Q. What month was that complete apparatus tried out of what year?

"A. *July 15, 1903*."

But it transpires that Plaintiff's Exhibit 10 had been set up the fall before, but it did not constitute the complete machine. It lacked the tank, etc. There was immediately after July, 1903, put up a three-line machine. See the complete testimony at R., p. 484.

Harvey Schau, who is criticized for testifying because he was only 19 years old at the time, testifies at R., p. 513 as to the circumstances of his employment. He says at R., p. 514:

"A. Until 1903 they were peeled by hand or by a little hand machine; *beginning* in 1903 they commenced to use what we called a *lye process*; beginning in 1904 the peaches were *all* peeled by the lye process."

When called upon to state what he knew, on the same page he says:

"A. I saw an experiment with some peaches in a wire waste-paper basket in July, 1902."

"A. I left South Haven in the first of August, 1902, and went to Hartford, and I was there until the 1st of November; the first of November I came back to South Haven, and there was installed in the basement of the north wing some machines that I had never seen before and one of these was as I was afterwards informed—was a machine for peeling peaches.

"THE COURT—Q. What date was that?

"A. The 1st day of November, 1902. I am very certain of that date because I was paid by the month then—I got paid twice a month and when I came to leave Hartford I was financially short and my check had not come and I had to

wait and make arrangements to postpone some payments until I got my check which came two or three days afterwards at South Haven.

"MR. CHAPPELL—Q. Do you know what became of the machine that you observed in November, 1902?

"A. I think it is still in existence; I know it is still in existence."

"A. Early in the next summer I was working in South Haven but my home was in Kalamazoo, and I made trips to Kalamazoo as often as I could, and on one of these trips I stopped in that factory in the morning before going to the train and they showed me an outline; they had some machines completed and some of them were in the course of completion, the whole line.

"THE COURT—Q. What time was this?

"A. I think that was either the day before or the day after the 4th of July.

"Q. 1903?

"A. Yes.

"MR. CHAPPELL—Q. What next did you observe after that as to the lye-peeling process?

"A. Soon after this the whole plant was moved to South Haven and it was operated at the beginning of the peach season in 1903."

And he identified the machine which he saw in November, 1902, as Plaintiff's Exhibit No. 10 (R., 515).

The proofs of plaintiff are therefore very clear and strong. The trial court was justified in accepting them. The testimony offered and the showing made of the Vernon machine shows it to be a different machine explained in the opinion. The Grier machine

was not in existence until after the date of Dunkley's conception and after the date of Dunkley's reduction to practice. The proofs show that it was not in use until August, 1903. It is doubtful if the statements there made are the fact, as we view it, but as they did not anticipate the Dunkley date it was unnecessary to take on the burden of attacking these statements.

We have deemed it best to refer specifically to this testimony in view of the violent attack of counsel for defendants-appellants. We can realize very well that counsel is very much overwrought from having lost a very important case. We submit, however, that he has not analyzed the situation dispassionately, as has the Judge below, and that his attacks on the witnesses and on the court below are wholly unwarranted and not justified under all the circumstances.

We will not discuss here his vituperation against plaintiff's counsel, further than to say that it is wholly uncalled for and would seem to indicate a lack of experience in matters of this kind. There is no perjury.

BURDEN OF PROOF.

Defendants-appellants urge that Grier was the prior inventor of the structure of the patent in suit. They state that Grier conceived the invention in the summer of 1902. Grier swears, using the language: "I conceived the idea right then—" (R., p. 305). This

is merely stating a conclusion of his and there is absolutely no proof that he conceived anything and none of the witnesses called to show that he conceived anything, established any facts in that behalf.

The proofs tend to show that in August, 1903, he produced a machine that would peel peaches. We have very grave doubts that he did this, but as Dunkley was earlier than that, having conceived his invention as proved in August, 1902, the frame of the machine having been identified as produced immediately thereafter and having been seen by Schau after it was set up as well as by the two Dunkleys, the question of diligence or priority of reduction to practice does not arise.

Dunkley was very actively engaged and he successfully operated his complete machine early in July, 1903, previous to Grier.

There is no law that Grier has any rights before he actually produced his machine. The Constitution of the United States says, Article I, Sec. 8: "Congress
"has power to promote the progress of science and
"useful arts, by securing for a limited time to in-
"ventors the exclusive right to their respective dis-
"coveries."

The inventors referred to here are those that Congress is seeking to protect and they are the only persons who have any right to their inventions at the date of conception. The inventor who does not seek the protection of the Patent Office can only rely on the

date when he completes the invention, so far as any decision has ever been rendered and so far as any citation of authority here is concerned. Where there have been rival inventors they are inventors who are seeking the protection of their inventions by patent from the United States Patent Office.

This is so well recognized that Macomber in "The Fixed Law of Patents" at Sec. 808, gives the general statement on the question of priority. He says:

"Priority is a question arising between two pending applications, a pending application and an issued patent, or between two issued patents. The first two conditions are subject for an interference proceedings; the third is a condition which may be met either by an action under 4918 R. S. (see Interfering Patents, Sec. 587), or it may be met and settled in an action for infringement. The subject of interference has been considered under Secs. 582-585."

There are no decisions considering the details of the development of an invention except there be (1) two applicants for a patent, (2) an applicant for a patent and a patentee, or (3) two patentees, as indicated. In all other cases of anticipation and of prior use the only thing that is up for consideration is the completed production of the article in question. There is no protection for an inventor during the development of his invention that he does not intend to patent; because it is clear that only patented inven-

tions and their development are contemplated to be protected.

It is a safe assumption that if an inventor does not consider his invention of sufficient value to apply for a patent within the time prescribed by law, he has produced no invention of value or anything that the public would be interested in.

However, this more or less interesting question does not arise in the case at bar. Dunkley, as appears by the proofs, conceived his invention first and had it finished first, and that puts an end to the entire question, as will be seen by a reference to the proofs.

While it is not a requirement under the conditions of this case, the proofs have been beyond a reasonable doubt, on the positive oath of three witnesses who identify the machine itself and not some document or picture relating to it. But it is clear that, as inventors are entitled to exploit an invention for any period under two years before applying for a patent, they would only be required to prove by a preponderance of the evidence any use of theirs within this limited period.

A review of the decisions under the heading "Burden of proof" at page 15 of the brief on behalf of defendants-appellants is therefore wholly unnecessary. The question is not here.

We submit that the rule of law laid down by the Supreme Court in the recent decision referred to in

the main brief, of *Adamson vs. Gilliland*, is conclusive and should apply here on the questions of fact.

It seems unnecessary to add anything further to the brief already filed herein where the discussion is as complete as need be.

Respectfully submitted.

FRED L. CHAPPELL,
Counsel for Appellee.

SEPARATE BRIEF BY JOHN L. MILLER.

Preliminarily we can not refrain from calling the Court's attention to the violent tone and intemperate language of defendants' brief. Its author appears to be actuated by personal animosity. He charges perjury by plaintiff's witnesses, intentional misrepresentation and bad faith of counsel, and makes veiled insinuations and innuendoes against the learned Judge of the lower court. While we are well aware that such matters will have no influence with the Court in arriving at a just decision of the case, yet we can not permit the occasion to pass without voicing our disapproval of the course pursued. Such matters are out of place in the argument of grave questions of law before a judicial tribunal, especially a tribunal of such august character as this Court, and we can only attribute this lapse from the proprieties to the uncontrolled passions of a disappointed litigant. Possibly after passion has subsided and calmness prevails counsel may see the error of their way.

Another matter we venture to note is the copious reference in defendants' brief to matters *dehors* the record. Purported quotations from the proceedings in the Patent Office and the briefs filed therein, as well as of other matters, are indulged in. Indeed, we are invited to follow the example and even "challenged" to do so, and the Court is asked to note if the challenge is accepted. We pass this by with

the remark that we are arguing this case on the record which is before the Court, and shall not so far forget a counsel's duty as to depart from the canons of proper practice.

Answering the brief on its merits, there appear to be four defenses relied on:

1. *Prior public use by Grier at Pasadena.*
2. *Surreptitious Patenting by Dunkley.*
3. *Prior public use at Fresno by the California Fruit Canners Association.*
4. *Unclean hands and acts of such iniquitous character as to disentitle plaintiff to any relief.*

These matters we proceed to examine *seriatim*.

THE GRIER PRIOR USE.

STATED IN A NUTSHELL THE DEFENDANTS' CONTENTION IN RESPECT OF THIS DEFENSE IS THAT THEY PROVED BEYOND A REASONABLE DOUBT USE OF THE INVENTION BY GRIER AS OF A DATE PRIOR TO THE DUNKLEY APPLICATION; THAT THEREBY THE BURDEN OF PROOF WAS SHIFTED TO THE PLAINTIFF TO PROVE BEYOND A REASONABLE DOUBT THAT DUNKLEY'S INVENTION ANTEDATED SUCH USE BY GRIER; BUT THAT PLAINTIFF HAS FAILED IN MAINTAINING THAT BURDEN OF PROOF, AND, CONSEQUENTLY, THE GRIER USE OPERATES AS A COMPLETE ANTICIPATION.

This involves three questions, two of fact and one of law, viz.:

1. *The question of fact, was the Grier use proved beyond a reasonable doubt?*
2. *The question of law, was it incumbent upon plaintiff to prove the date of Dunkley's invention prior to the Grier use beyond a reasonable doubt, assuming that the Grier use had been proved beyond a reasonable doubt?*
3. *The question of fact, did the plaintiff successfully maintain the burden of proof required of it, assuming that the burden was as asserted by defendants?*

If the first question be answered in the negative, then the other two questions become useless and need not be considered, because in such event the patent becomes immune from attack by the Grier use by reason of failure of proof of such use.

We challenge the sufficiency of defendant's proof of the Grier use as of the date asserted for it. The date claimed by defendants in that regard appears to be July, 1903. It is true that some evidence was given as to *conception* by Grier in 1902, and also of his *beginning to build* the apparatus in April, 1903; but these matters are wholly irrelevant in considering this particular defense of prior use.

The specific defense under consideration is actual prior use by Grier, and of course there could be no such use until a machine or device was completed and actually put into use. Under the statute it is the actual *use* which invalidates, not the *conception* or *preparation* for use. Those matters might possibly be relevant in some other defense, but they are not relevant in the defense we are now considering.

The crucial question, therefore, is, at what particular date, if any, have the defendants proved the Grier use beyond a reasonable doubt?

Their theory is that they have proved such prior use as of July, 1903. We do not deny that at some time or other Grier used the machine which he says is an anticipation, but we do deny that there is sufficient proof to show when that machine was first

put into use. The story put forward is that some time in July, 1903, Grier completed two machines, one for his own use at the Pasadena Canning Co., and the other for the Eastside Canning Co. at Los Angeles. The Pasadena machine has been dismembered and broken up and there is no physical, concrete evidence left concerning it. The alleged Eastside Canning Co. machine has been produced in Court. There appears to be no dispute regarding its construction, and the crucial question is, when was it first put into use?

Grier himself is the principal witness. He testified (R. 304) that in 1902 he formed a partnership with Mr. Taylor and leased the Pasadena Packing Company plant in Pasadena and there installed a peach peeling machine in 1902, which is not claimed to be an anticipation, although it made use of lye dipping.

(NOTE: This testimony was based on his recollection. The lease of the Pasadena Packing Company was not produced, nor any record evidence relative to the matter).

He then states (R. 305) that "in the fore part of April" of 1903 he employed W. H. Finley, a carpenter, to build him "some tanks," which were to be embodied in the peach peeling machine, which he says he had theretofore conceived, and that these tanks were merely the wooden tubs used with the device; that he built two machines at the same time and "got

them ready for the 1903 peach season"; that the lye tanks used in connection therewith were called grasshoppers, and were purchased from Berger Carter Co. in San Francisco "along in April, 1903."

(NOTE: No record evidence of this purchase was offered, nor was anyone called as a witness from the Berger Carter Company to substantiate the statement, but said statement stands on the recollection of Grier).

It appears that these two grasshoppers were standard machines of the type which had been used many years before for scalding tomatoes. Grier says that they were delivered to his plant at Pasadena (R. 307), though he does not say when; that they did not have heating coils when delivered, and that he put heating coils into them.

Then the following testimony was given by him on page 311:

"Q. When were these two machines in 1903 first assembled and ready for testing in their two respective places, one in Los Angeles and one at Pasadena?

"A. About the latter part of July.

"Q. What was the first test that was made?

"A. I would say about the 28th or 29th of July."

In regard to these tests he says they demonstrated that the grasshoppers were leaky and would not hold water, and he employed two machinists from the Baker Iron Works to chip and caulk them (R. 311).

Continuing his testimony on page 312, he says that the water pressure at the East Side Cannery was not sufficient for the production of operative sprays for the machine and it was necessary to install a pump in connection therewith to obtain additional pressure, which pump was obtained from the Baker Iron Works of Los Angeles, and was delivered, according to his testimony, "early in August, I think the 3rd" (R. 312).

It is quite evident from the foregoing that the use of the East Side Canning Company's machine was after the installation of the pump, and the evidence which the witness gave as to the date when that pump was installed was to the effect that he *thinks* it was the 3rd of August.

Witness was then asked if he could tell by reference to his books when his own machine at Pasadena was first used in 1903, and in answer to that question he says (R. 319):

"A. I could come within a few days of it, yes.

* * *

"Q. Do you remember the date?

"A. Not right off the bat, no.

"Q. How close to it can you give it?

"A. I should judge it was the latter part of July.

"THE COURT: He has said that before.

"MR. MILLER: He said July 29th.

"A. About that date."

Continuing he said that in the next year, 1904, he found it necessary to put a pump in his own machine in order to increase the water pressure for production of the sprays (R. 328).

On cross-examination he stated that the use of his machine at the Pasadena Cannery in 1903 was open and public and no steps were taken to exclude it from the view of the public, although in the following year of 1904 he built a partition around it so as to exclude it from view (R. 336).

(NOTE: This is contrary to the testimony of the witness Finley, the superintendent of the factory, who says that a seven foot partition was placed around the machine in 1903 to exclude it from view, and he was instructed to do that, Grier saying, "This is not a public machine" (R. 251).

On page 339 the witness admits that he never applied for a patent on this machine, although he had applied for and obtained patents on other machines connected with the canning art, one for a curved paring knife in 1900, and the other for a peach pitting machine, in 1898. And very recently he secured a patent on a peach *washing* machine, which he substituted for the alleged anticipating machine after receiving the infringement notice from Dunkley. (This patent appears at page 898 et seq.) In other words, when notified that his machine was an infringement of the Dunkley patent, he discontinued the use of the

same, dismantled it entirely, and substituted in its place a new machine which he devised, invented, and patented himself, and which he claims is not a spraying machine, but is nothing more than a *washing* machine (R. 342-3).

From the foregoing review it will be seen that Mr. Grier relies upon his memory for fixing the use of the machine and the date of such use, save and except for two vague and indefinite entries in his books of the sale of some kind of machinery to the East Side Canning Co., hereafter to be noticed, and his recollection is that the two peeling machines were tested "about July 28th or 29th," and that *he thinks* on August 3rd the East Side Canning Co.'s machine was finally completed by the addition of a pump for increasing the water pressure and thereby producing the necessary spray effect. Consequently, it can not be claimed by defendants that the alleged prior use actually began until after August 3rd, 1903, and even that date is dependent upon memory. We assert, therefore, that Grier's testimony fails to prove beyond a reasonable doubt any particular date at which his alleged prior use began. All that he pretends to testify to is that it began somewhere along the latter part of July or the beginning of August, and was continued during the peach season of 1903. It seems to us that such evidence is insufficient and does not measure up to the standard required by the law for showing anticipation by prior use. If such contention is

well founded, then all of Grier's evidence with reference to use in 1903 must be disregarded.

W. H. FINLEY was called by defendants for the purpose of corroborating Grier. He testified that he was a carpenter and that he went to work for Mr. Grier at his Pasadena cannery in April, 1903, to build an addition to his plant, a boiler house (R. 236); that after fixing up the boiler house he built two sets of redwood tanks for peach peeling machines, one for the Pasadena Cannery and one for the East Side Cannery (R. 237); that he got them finished before the peach season opened and *he thinks* it was about the middle of July (R. 239); that the machine was put in operation in the Pasadena cannery "in 1903."

When asked as to the date of completion of the peach peeling apparatus, he answered (R. 241):

"I could not state the date, but it was along in connection with the work I was doing on the tanks and the peeling apparatus.

"Q. I mean, when was it completely assembled?

"A. Well, as I said a little while ago I think about the middle of July.

"Q. 1903?

"A. Yes, 1903. Of course there might have been some minor alterations made, but it was ready then for experimental work, I am satisfied, as early as that."

(NOTE: This testimony does not tally with that of Grier, who says the machines were first tested about

July 28th or 29th; nor with that of Herman, who fixes the date as July 10.—R. 358.)

Continuing, the witness says that he operated the Pasadena machine during the season of 1903 and during the season of 1904, and also in the seasons of 1906-7 and 8, being absent in 1905 (R. 245). That the machine was used during the season of 1903 "for washing peaches."

(NOTE: The witness continually uses the term "washing," instead of "peeling," during his entire testimony, always referring to the machine as a machine for *washing* peaches, or as a *washing* machine.)

He says that in 1903 he had instructions from Grier not to allow people to examine the machine and he was prohibited from giving any information on the subject, he being the man in charge of the machine, and he constructed a seven foot partition around the machine so as to exclude it from view, Grier saying to him, "This is not a public machine" (R. 250-1).

(NOTE: This is contrary to the testimony of Mr. Grier, who says that the machine was in open public use and was not enclosed by any partition in 1903.)

Continuing his testimony witness says that he built the two machines from verbal descriptions given him by Mr. Grier, and that he had no drawings (R. 253). When asked the date of installation of the machine

in the East Side Canning Company he answered, "I cannot recall the date, but it evidently was in July, 1903" (R. 256).

When he was asked how long it was after he installed the machine at Pasadena and made the preliminary tests before the machine was running at full capacity, he answered at page 271, as follows:

"A. I don't know; it was a short while because when the peaches begin to get ripe they ripen up pretty rapidly and you can't have much delay.

"Q. What is your best recollection—how long was it after you tested the machine before you had it running full capacity?

"A. Well, I could not say on that; it might have been a week; it might have been two weeks.

* * *

"Q. Now, then, the question I asked you: how long was it before this general crop that you made your tests to know that the machine was right?

"A. I don't know; it was not a very long time.

"Q. You do not remember about that?

"A. I do not remember about that; I did not pay any attention to that; that did not concern me, and I did not pay any attention to it.

"Q. If the crop came along about the middle of August it might have been the first of August that you made this test; is that right?

"A. It might have been.

"Q. Your recollection is in no way clear that it was during the month of July? It might have been early in August; that is right?

"A. It might have been early in August; it might have been in the middle of July or later; I am not clear on that because I paid no attention to that at all" (R. 273).

It will be seen from the foregoing that the testimony of Finley does not begin to measure up to the standard required by the law for proving anticipation. It is based entirely on his memory, thirteen years after the event. And in one respect he squarely contradicts Mr. Grier, where he testifies that he was ordered to keep the machine secret and that a seven foot fence was built around the machine to exclude it from public view, whereas Grier testified that there was nothing of the kind and that the machine was at all times in open, public view. It is more likely that the testimony of Finley on this subject is correct, for not only is he a disinterested witness, but it would be a natural proceeding for Grier to have taken. He was a patent man accustomed to designing new machines and securing patents, and it is quite likely that he would have desired to preserve this machine in secrecy. Under these circumstances no credence can be given to his testimony regarding the absence of the seven foot fence, and if he has testified falsely in respect of that matter, he is to be distrusted in respect of other matters.

Finley's testimony is also at variance with that of Grier in reference to the date of completion, Finley putting it at the middle of July and Grier on the 28th or 29th of July.

WITNESS C. L. KENNEDY gave a short deposition, appearing between pages 349 and 353. He testified that in 1903 he was working for the San Jacinto Packing Company in Riverside County, but during that year he visited Mr. Grier's plant at Pasadena, and in that behalf gave the following testimony at page 352:

"Q. In 1903, were you at any time in Mr. Grier's plant at Pasadena?

"A. Yes.

"Q. Did you know anything about whether or not he had any machine there?

"A. He had; he had this machine of his laid up, that we have been talking about.

"Q. Can you describe the machine as you saw it down there in 1903?

"A. As near as I can remember it was the same identical machine that we had at Orange County Preserving Co. in 1904.

"Q. You mean one just like it?

"A. Yes, one just like it."

This testimony is scarcely worthy of serious consideration. It is merely the recollection of the witness thirteen years afterwards of what he saw in Grier's cannery on a casual visit thereto, and even at that it does not appear that the machine was in use, for he says that it was "laid up." Nor does he fix any specific date, merely saying it was "in 1903." Such testimony is of no value in proving a matter of this kind.

W. F. HERMAN (R. 354-360) testified that he worked for Grier in 1903—"on or about the 15th of June"; that he there met W. H. Finley who was "building some tanks"; that he (witness) assisted in the installation of the machine; that the grasshopper "leaked very badly" and Mr. Grier had some mechanics come and fix it up, and after that it was used for peach peeling, but witness did not have anything to do with its operation, not being employed on the machine. If Grier's statement that the tests were not made until July 28th or 29th is true, then it must have been after that date that the mechanics came and stopped up the leaks.

On cross-examination he testified that the earliest day he remembered of seeing this peach peeling machine operate at the Pasadena cannery was "in July, 1903," and when he was asked what made him think it was in July, he replied as follows (R. 358):

"Because it was used on the free stone peaches; they get ripe about the 10th of July and it was used at the start" (R. 358).

This is contrary to the testimony of both Grier and Finley, the former fixing the date as July 28th or 29th, and the latter as the middle of July. Here we find a material conflict between this witness and Grier and Finley, and that too on the crucial point of the case, viz: the time when the use of this machine began.

But to make matters still worse, this witness was asked, at page 358, if he was sure that the machine was tested before July 29th, and he answered, "No, I can not swear to that." What explanation is to be given of this answer? He had already testified that the use of the machine had begun on early free stone peaches about July 10th, and then immediately after that he says he could not swear that the machine was tested before July 29th. Clearly this man's testimony is not worthy of much consideration.

MRS. ALMA GRIER, wife of the defendant George Grier, gave testimony to the effect that she worked in the Pasadena Cannery during the peach season of 1903 (R. 366); and that this peach peeling machine "was used in 1903" (R. 367); that she never saw the East Side Canning Company's machine in actual use (R. 368).

The sum and substance of this lady's testimony is merely to the effect that according to her recollection her husband's peach peeling machine was used during the peach season of 1903. She does not attempt to fix any date at which this use began. Hence her testimony is of no value as fixing any such date.

G. C. WATERHOUSE testified that he was a school teacher; that he worked for the Pasadena Cannery Company in 1902, and worked there for three

years during his summer vacations. He was then asked the following question (R. 373):

“Q. During any of those summers, or during those seasons, did you have anything to do with the peeling of peaches?”

and he answered that he was employed in carrying peaches from the end of the peeling machine to the packing table, and then he undertook to describe the peeling machine, which he did in a vague and general manner. He was not asked on direct examination when he first saw this machine, but on cross-examination he gave the following testimony on the subject (R. 376):

“Q. When did you first see it?

“A. I don’t know just when—the second year I was there is the first time I saw the machine or got acquainted with it.

“Q. What month did you go there in that second year, 1903?

“A. I could not tell you exactly the month; it was around the close of the school year; I was in school at the time.

“THE COURT: Q. What time did school close?

“A. I believe in June. I went to work there permanently then, that is, for the summer season.

“MR. CHAPPELL: You think you went to work there in June and saw the machine in operation there in June?

“A. I could not say; it was during that season that I worked on the machine, and took the fruit

away; I don't remember just the time that we started to peeling the peaches."

Clearly this testimony does not measure up to the required standard.

EDWARD A. TAYLOR testified that he was engaged in the canning business and was in partnership with Mr. Grier from 1902 until the fall of 1906 at Pasadena (R. 379): that during the year 1903 he used the Grier machine in controversy for peeling peaches at the East Side Canning Company; that he first tried the machine two or three days, but found the water pressure too low, and thereupon he bought a pump from the Baker Iron Works in August, 1903, and installed the same in the machine for the purpose of producing the necessary sprays (R. 380-1); that during 1903 he was at the Pasadena Canning Co. during the peach peeling season and they were peeling peaches there with the same kind of a machine, and that said machine was identical with his machine used at the East Side Cannery (R. 382).

The substance of this testimony is that at some time during the peach peeling season of 1903, these two Grier machines were used. No definite date is given.

MARY E. MAYES testified that she worked in the Grier cannery in Pasadena from 1902 to 1916; that "in 1903" they used Grier's new machine with a grasshopper (R. 387).

Clearly there is nothing definite in this testimony.

F. F. STETSON testified that he was the proprietor of a small cannery in Southern California, and then gave the following testimony at page 389:

"Q. Were you ever in his (Taylor's) East Side Canning plant on North Ave., Los Angeles?

"A. Yes.

"Q. Do you know how he peeled peaches in that plant?

"A. Yes. He peeled them with lye using the machine known as the Grier machine, made in Pasadena.

"Q. When did he first use that machine?

"A. In 1903, I believe."

Like all the other testimony referred to, this merely goes to show that the Grier machine was used "in 1903"; but it is not as definite as the testimony of the other witnesses, for this man merely says that he *believes* it was in 1903. Clearly his *belief* is not competent proof of the fact of use.

FRANK H. SANBORN testifies that during the years 1901, 2, 3 and 4, he was in Mr. Taylor's employ at the cannery at East Side, and that in 1901-2 and 3 he used a lye process for peeling peaches (R. 392); that "in 1903" a change was made in that process and that "in 1903 they put in a machine that scalded the peaches and it went from that into a line of tanks or a line of tanks or carriers they were washed." Also after "leaving the scalding tank they went on to a washing arrangement with sprays, coming from the

scalded it went on to a platform, a cradle arrangement," and that it was the style of arrangement similar to the one shown in Court (R. 393).

This evidence is insufficient to establish any definite date. He merely says the use was "in 1903," and he does not give any accurate description of the machine.

LUSBY, a bookkeeper, also testified that he saw the Grier machine, styled "the line machine," operating on peaches "during the year 1903" (R. 294).

So far as we now recall, the foregoing constitutes all the evidence introduced by defendant for the purpose of showing a prior use of the Grier machine at Pasadena and East Side canneries during the year 1903. We submit that the evidence is insufficient for proving the date of such use beyond a reasonable doubt. At most it merely shows that the machines were used sometime during the peach season of 1903. It does not conclusively show when that use began, which is the crucial question in this connection. All presumptions in a matter of this kind must be taken against the party alleging the prior use, because the use, in order to avail, must be proved beyond a reasonable doubt.

We do not lose sight of the fact that some book accounts were offered in evidence by the defendants, presumably for the purpose of fixing dates; but they are insufficient. They are copied at pages 296-7 of the

record, the material ones appearing on page 297. The first item is under date of May 29, 1903, and consists of a charge against the East Side Canning Co., for what is designated there as "Tool & Fix, \$278.00." This entry fails to identify anything with sufficient clearness to enable us to know what it covers. It would appear to refer to tools and fixtures, but what those tools and fixtures are is not apparent from the entry itself. Certainly there is nothing in the entry to show on its face that it refers to a peach peeling machine. Grier says it refers to grasshoppers; but that is merely his recollection, and furthermore such grasshoppers had been used for scalding tomatoes for many years. Consequently, if this term "tool & fix" referred to a grasshopper, the probability that it was a tomato scalding machine is not excluded. Also note the date of the entry—May 29; but it is not claimed by Grier that the peach peeling machine was finished and tested until July 28th or 29th. Query,—May not the entry refer to some other machine, which was purchased a month before the peeling machine was finished, for instance—a tomato scalding machine? Such alternative is not excluded by the evidence.

Another entry is one taken from page 54 of the journal, dated July 30, 1903, and consists of a charge against the East Side Canning Co. for "4-Convey vats—main line—Putting in vats and placing in steam coil," and then underneath this ambiguous entry appear the words "Tools & Fix 225.00, labor 50.00."

Like the items first referred to, this one is also indefinite in terms and does not show on its face that it refers to a peach peeling machine. Grier says it refers to the four vats of the lye machine, but that is merely his recollection. Why those four wooden vats should be styled tools and fixtures is not apparent.

Another item in the journal, at page 55, is a charge under date of July 31, 1903, against the East Side Canning Co., for "soda, etc., per Inv. 19.69."

The last item is September 18, 1903, being a charge to East Side Canning Co. for "soda per Inv. 39.38." The only relevancy of these last two items would appear to be that the Pasadena Canning Co. sold to the East Side Canning Co. some soda; but as it appears from the evidence that the lye dipping or soda process by means of wire baskets had been used in these canneries since 1902, it may be that this soda was used for that purpose. There is nothing on the face of the entry to show that this soda was used in the Grier peach peeling machine in 1903.

We submit that the defendant's evidence is not sufficient under the rule to fix any definite date when the Grier use began. If so, then it is unavailing for the purpose of anticipation. If it be argued that it at least fixes a use in the peach season of 1903, then under the rule of presumptions applicable to such cases the use could not be predicated as of any date prior to the end of the season. But when did the

peach season end? The evidence does not fix that date, and one of the witnesses of defendant's states that the peach season for 1903 was late.

BURDEN OF PROOF.

BUT ASSUMING FOR THE PURPOSES OF THE ARGUMENT THAT THE GRIER USE WAS PROVED BEYOND A REASONABLE DOUBT, WHAT WAS THE MEASURE OF PROOF REQUIRED OF THE PLAINTIFF IN CARRYING THE DATE OF THE DUNKLEY INVENTION BACK OF SUCH GRIER USE?

In the defendant's brief it is asserted that such burden of proof "is precisely the same burden that was in the first instance upon the defendant to prove such Grier invention," that is to say, *proof beyond a reasonable doubt*. We challenge this contention and assert that the quantum of proof required of plaintiff in such contingency was merely a *preponderance of evidence which convinces the court*.

The rule is laid down in *Walker on Patents*, at the end of Section 76, in the following language:

"Where an anticipating fact prior to the date of a patent is proved beyond reasonable doubt, the burden is shifted to the plaintiff to prove, by convincing preponderance of evidence, that his invention was made still earlier than that fact occurred; and if the plaintiff does not introduce enough evidence to strongly outweigh whatever evidence is introduced to the contrary, the patent must be held to be void for want of novelty."

In support of this rule the author cites *Clark Thread Co. vs. Willimantic Linen Co.*, 140 U. S., 492, and many other cases.

In opposition to this defendants rely upon three cases, viz:

Thayer vs. Hart, 20 Fed. Rep., 693;

Dey Time Register Co. vs. Bundy, 178 Fed. Rep., 818;

Wheaton vs. Kendall, 85 Fed. Rep., 672.

Thayer vs. Hart was a decision by a *nisi prius* court in the Southern District of New York, and did not relate to a contest between plaintiff's patent and a prior use, but related to a contest between plaintiff's patent and defendant's patent. In other words, both parties owned patents, and the Court says:

"The principal controversy relates, therefore, to the question of priority of invention."

In such case one patent is entitled to the same presumption as the other. They both stand on the same footing. The defendant succeeded in proving beyond a reasonable doubt that the invention of his patent was made eleven months prior to the filing of complainant's application. In fact the Court says that this was "conceded on the argument." In this state of the case the Court held that it was incumbent upon plaintiff to show the date of the invention of his patent anterior to the defendant's date by the same character

of evidence as that produced by the defendant, to-wit, proof beyond a reasonable doubt. This was apparently based on the theory that the defendant's patent was entitled to the same presumptions as plaintiff's patent, and the measure of proof in each instance was the same. But where the contest is between the plaintiff's patent and a prior use which never eventuated in a patent, then the rule is different. In such case plaintiff is not required to prove the date of his invention beyond a reasonable doubt, but only by a preponderance of evidence which convinces the Court.

This distinction seems to be recognized by the Court of Appeals for the First Circuit in the case of *Westinghouse v. Stanley*, 133 Fed., 174, where the two rules are discussed, and the milder one adopted, following the decision of the Supreme Court in the case of *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S., 492.

This Court also seems to make the same distinction in the case of *Wilson & Willard Mfg. Co. v. Bole*, 227 Fed., 609-10, where the controversy was between the plaintiff's patent and the defendant's application for a patent, which was pending in the Patent Office before the issuance of plaintiff's patent. In that case this Court held that the "reasonable doubt" rule did not apply to either patent, on the principle that where the contest is between two rival patents, each of which is entitled to the same presumption, the reason for

the rule applicable in a case of an unpatented prior use ceases, and therefore the rule ceases with it.

The second case cited by defendant, that of *Dey v. Bundy*, 178 Fed., 812, was by the Court of Appeals of the Second Circuit, the same circuit in which *Thayer v. Hart* was decided, and the conclusion reached was based entirely upon *Thayer v. Hart* as an authority. It was not a case between two rival patents, but the Court analyzed the plaintiff's proofs regarding priority of invention and criticised them sharply as being unsatisfactory and not convincing. No records were produced by plaintiff to sustain his contention, and his proofs consisted merely of the recollection of witnesses. It is further to be noted that it was one of the plaintiff's own witnesses who furnished the proof of the prior use relied on by the defendant, the same having been brought out on cross-examination. That proof, says the Court, "was very positive and specific and supported by record entries in the books of the manufacturers." And it is further to be noticed that the plaintiff conceded the date of the prior use as claimed by the defendant. It is evident from this that it would require strong proof on the part of the plaintiff to antedate that prior use, and it would appear that it was by reason of such consideration that the Court held plaintiff's proofs in that regard insufficient.

But if it be held that this *Dey Time Register Co.* case establishes the doctrine that in a case of contest

between plaintiff's patent and an unpatented prior use plaintiff must antedate the prior use by evidence beyond a reasonable doubt, we submit that such holding is contrary to the text books, the decisions of the Supreme Court, the Court of Appeals of other Circuits, and the decisions of this Court. Hence it should not be followed.

The third case cited by defendant is *Wheaton v. Kendall*, 85 Fed., 672; but it has no bearing on the issue here involved. That was a case brought under Section 4915 of the Revised Statutes to determine the question of priority of invention between two conflicting applications in the Patent Office after a decision therein against one of the parties and the issuance of a patent to his rival. In such a case one man is entitled to no advantage over the other in respect of presumption, and the same rule of evidence is applicable to each of them. The issue in such case is, which of the two was the first and original inventor of the invention covered by the interference? There is no such question in the case at bar. The only question here is, whether Dunkley made his invention prior to the date of the unpatented use by Grier. There is no contest as to priority of invention between Dunkley and Grier, nor could there well be, because Grier never applied for a patent at all on the device. We think these considerations differentiate the Wheaton case from the one at bar, and we reiterate our position as follows:

Whatever may be the quantum of proof required of a plaintiff in carrying the date of his invention back of an anticipating patent issued to another in a case where the contest is between plaintiff's patent and the other patent, the law seems to be settled that in case of a contest between plaintiff's patent and an unpatented prior use dependant on the recollection of witnesses, the quantum of proof required of plaintiff in carrying the date of his invention back of such use is merely that of a preponderance of evidence which satisfies the Court, and he is not subject to the stringent rule of "no reasonable doubt."

THE BEEKHUIS PATENT AND INTERFERENCE.

It appears that while Dunkley's application was pending in the Patent Office a patent was issued to Beekhuis for the same invention, whereupon an interference was declared, which ultimately resulted in favor of Dunkley.

The defendants contend that the introduction in evidence of this Beekhuis patent, which was dated September 3, 1907, cast upon plaintiff the burden of proof of carrying the Dunkley invention back of that patent. Ordinarily this would be true. But it is not true in this case, because the defendants introduced in evidence at the same time a certified copy of the file wrapper contents of the Dunkley patent, from which it appears that an interference was declared

between Dunkley's application and the Beekhuis patent, and that said interference was determined in favor of Dunkley, thereby establishing of record the fact that Dunkley's invention antedated that of Beekhuis. Thus we see that defendants themselves by their own evidence destroyed all possible effect that might presumptively arise from the issuance of the Beekhuis patent. Had they been content to introduce the Beekhuis patent without accompanying it with the Dunkley file wrapper contents, we would have been confronted with a different situation. But by their own acts they have nullified any presumptive effect arising from the Beekhuis patent, and that patent cuts no figure in the case except as strengthening Dunkley's contention.

It is also averred by our adversaries that the decision of the Court of Appeals for the District of Columbia in favor of Dunkley in the interference "in no way affects the situation in this case," it being asserted that only one point was there considered, to-wit, "whether or not Dunkley was entitled to make the claims calling for peeling jets, in view of the fact that in his application, as filed on November 29, 1904, and as prosecuted until after the time he saw the Beekhuis patent, Dunkley had not used the term 'peeling jet' or 'peeling spray' or any equivalent term" (Defendant's brief, p. 25). It is iterated and reiterated again and again by defendants in their brief that such issue was the only one involved in the inter-

ference, and that the question of priority of invention by Dunkley was not an issue, but was undisputed. But reiteration of an erroneous statement cannot inject truth into it, however vociferous and violent the reiteration may be.

This statement is wholly erroneous. *Priority of invention was in dispute in the interference.* Testimony was taken thereon, and indeed that is the only point on which testimony was taken. It is quite true that *one* issue in that case was the right of Dunkley to make claims for peeling jets, which issue was decided in favor of Dunkley. After that question of law was decided, then the issue of fact as to priority of invention arose, and after testimony taken was decided in favor of Dunkley.

In the decision of the Commissioner of Patents, copied at the end of Defendants' brief, after defining the issues, it is said:

"Both parties have taken testimony. * * *

"The dates alleged in the preliminary statements of the respective parties are as follows:

		Dunkley		Beekhuis
Conception	August	1902,	July	1903
Disclosure	Sept.	1902	July	1903
Reduction to practice	July	1903	February	1904

"The testimony in behalf of Beekhuis shows that about July, 1903, he performed certain experiments in peeling fruit by the use of jets of water.

Beekhuis testifies (Q. 10) that he used a hose to direct a jet of water upon peaches which had been treated with a skin-disintegrating solution and that he discovered that the jets would perform the operation of peeling the fruit. His testimony in regard to these experiments is corroborated by that of the witnesses Fontana and DeRegt. These experiments apparently proved to Beekhuis that the idea of using jets of water for peeling fruit was a feasible one. But they do not show, however, that at this time Beekhuis had a full conception of any mechanism by which this idea was to be carried into practical operation. In fact, Beekhuis practically admits (Q. 10, page 12) that he had no conception of any such mechanism when he states that the question of how to manipulate the fruit and use the water jets would have to be worked out. The testimony of the other witnesses is also deemed insufficient to show that Beekhuis had a conception of the invention in July, 1903, or at any time prior to the building of his first machine, which was in the early part of 1904. The testimony shows that this machine was completed about February 1, 1904, and was first successfully operated in the following summer. It is also clearly shown that said machine included the invention in issue, and its successful operation about June, 1904, entitled Beekhuis to that date for reduction to practice of his invention.

"Dunkley claims to have conceived the invention in August, 1902, and to have reduced the same to practice by the construction of a peach-peeling machine in July, 1903. He also claims to have built a second machine of larger capacity in September of that year. It is unnecessary to consider the evidence in regards to Dunkley's conception of the invention. If the machines

above referred to contained the invention in issue and were actually built and successfully operated at the time alleged, it is clear that Dunkley is entitled to a reduction to practice of the invention prior to any date of conception satisfactorily established by Beekhuis.

"The evidence is deemed sufficient to show that two peach-peeling machines were built by Dunkley at the time alleged. * * * This evidence satisfactorily establishes that Dunkley built and successfully operated fruit peeling machines at least as early as the fall of 1903, and he is therefore entitled to that date for reduction to practice of whatever invention was included in these machines."

It will be seen from the foregoing that priority of invention was an issue of fact involved in the interference and the same was decided in favor of Dunkley. The Commissioner of Patents then went on in his opinion to hold that Dunkley was not entitled to make the claims for peeling jets because of an insufficient disclosure thereof in his original application.

The case then went to the Court of Appeals for the District of Columbia, which court affirmed the ruling as to the issue of priority but reversed it as to the right to make the claims to peeling jets and decided that Dunkley was entitled to make such claims, and that there was sufficient basis for them in his original disclosure. In deciding the case, the Court of Appeals said:

"All the tribunals of the Office found that Dunkley was the first to conceive and reduce to practice, provided he was entitled to make the claims of the issue, and this decision was undoubtedly right."

And in winding up its decision, the Court of Appeals said in reference to Dunkley:

"His specifications and construction afforded sufficient foundation for the claims; and as he was the first to conceive the idea and reduce it to successful practice, he is entitled to the award of priority. The decision will, therefore, be reversed; and this decision will be certified to the Commissioner of Patents."

It will be seen from the foregoing that the issue of priority of invention was involved in the interference, and that "all the tribunals of the Patent Office" decided that issue in Dunkley's favor. This demonstrates the error of our adversaries when they say that such an issue was not involved in the interference. The sum and substance of the interference matter is that Beekhuis was defeated on the question of fact as to priority of invention, and then resorted to the technical expedient of contending that, although Dunkley was the prior inventor of the peeling jets, he was disentitled to make the claims because of an insufficient disclosure thereof in his original specification. This was the last resort of a badly defeated litigant, which ultimately went the way of the other issue.

PLAINTIFF'S PROOFS OF DATE OF INVENTION.

BUT WHETHER VIEWED UNDER THE "REASONABLE DOUBT" RULE OR THE "PREPONDERANCE OF EVIDENCE" RULE, THE PROOFS SUBMITTED BY PLAINTIFF IN REBUTTAL ARE AMPLY SUFFICIENT TO ESTABLISH THE DATE OF DUNKLEY'S INVENTION PRIOR TO THE GRIER USE.

Plaintiff's evidence in that behalf consisted of the testimony of S. J. Dunkley, Melville E. Dunkley, Harvey C. Schau, Exhibit 10 (the original frame of the first experimental machine), certain written exhibits, and the decision of the Court of Appeals of the District of Columbia in the Interference case of *Dunkley v. Beekhuis*, together with the inferences logically deducible from the facts and circumstances of the case and the experience, career and standing of the patentee Dunkley. In addition to this, the case was tried in open court and the Judge thereof was enabled to determine for himself the credibility of the witnesses.

Mr. Dunkley is a prolific inventor in the fruit canning art, having taken out from time to time during his career ten or more patents prior to the one in controversy. They are catalogued at pages 476-7. He owned two canning establishments, one at South Haven and the other at Kalamazoo in the State of Michigan, where enormous quantities of

fruit were processed, employing from two to three hundred operatives (R. 481) and using a million cans per annum (R. 478). It was his business to keep abreast of the times in the matter of new inventions and labor saving improvements. He details the circumstances under which he conceived the invention, the time being fixed in August, 1902, when he explained it to his son (R. 479). During the summer of that season he built the model machine, of which the frame is represented by plaintiff's Exhibit No. 10 (R. 479-80), the same having been preserved and brought into court at the trial. This is now before this Court. He tested out the principle of the invention with that machine in 1902 (R. 479), but without the use of a connected lye tank (R. 451). That was at the end of the peach season of 1902. In the following spring he ordered from the Clark Engine & Boiler Co. a lye tank to go with the machine, and in July, 1903, this lye tank was coupled up with the machine, and the same was used during the peach season of 1903, beginning about July 15th, upon the early Georgia peaches brought from the South, and continuing until the end of August, or thereabouts (R. 415-18, 435, 438-40, 463-6). This first machine was of a rough character and was soon superseded by a new machine of larger capacity built during the summer of 1903. This larger machine was used some in the peach season of 1903 and largely in 1904, with great success, and thereafter, on

November 29, 1904, Dunkley filed his application for a patent.

This application met with a stormy passage through the Patent Office. While it was pending and before issuance it was discovered that the Patent Office had issued to one Beekhuis a patent for the same invention, the Beekhuis patent being numbered 864,944, dated September 3, 1907, application filed May 25, 1904. After many hearings in the various Patent Office tribunals, some of which were in favor of Dunkley, and others in favor of Beekhuis, the controversy finally went to the Court of Appeals of the District of Columbia and was decided by that Court on January 6, 1913, in favor of Dunkley, in which decision the Court of Appeals says:

"All the tribunals of the Office found that Dunkley was the first to conceive and reduce to practice, provided he was entitled to make the claims in the issue, and this decision was undoubtedly right."

In closing its decision, the Court said in reference to Dunkley:

"And as he was the first to conceive the idea and reduce it to successful practice, he is entitled to the award of priority."

During the interim the canners of California had put the invention into extensive use, so that when Dunkley finally emerged from the Patent Office in

July, 1914, he found himself confronted with a multitude of infringers scattered throughout the State of California. Some of these infringers utilized the specific construction claimed to have been used by Grier in 1903. Others used a different form of construction consisting of a revolving cylinder with spray pipes extending longitudinally through the center. These two forms of construction are involved in the present eight cases now before the Court, some of the defendants using one construction and some using the other.

Dunkley's fight has been a long and tedious one, covering a period of fourteen years up to date, and there appears to remain a long fight still awaiting him in his efforts to secure for himself that remuneration which the law awards him for the highly useful invention which he has made.

The witnesses called by plaintiff to prove the above facts were S. J. Dunkley (R. 475 et seq.), Melville E. Dunkley (R. 413 et seq.), and Harvey C. Schau (R. 513 et seq.). S. J. Dunkley is the patentee, M. E. Dunkley is his son, and Schau was at the times in question an employee of the Dunkleys, but is not now connected with them in any capacity.

The chief criticism which our adversaries urge against the Dunkley proofs is the assertion that at the trial of the case the two Dunkleys testified differently from what they testified in the Beekhuis interference in the Patent Office. In that behalf it is

contended that in the Interference case they testified that the first experimental machine (Plaintiff's Exhibit 10) was made in July, 1903, whereas at the trial of this case they testified that it was made in 1902 and put to use in July, 1903.

If that contention were true, it would not alter the result, because July, 1903, is prior in time to the Grier use. Defendants appear to think that the exigencies of the case developed at the trial required the Dunkleys to change the time of the building of this model from 1903 to 1902 in order to antedate Grier, and they assert that the Dunkleys did so change their testimony for the purpose stated, and that in doing so they deliberately committed perjury. But, as we have already shown, if the model was not built until July, 1903, that would be sufficient to offset the Grier use, and, consequently, there was no need or occasion, much less any intention on the part of the Dunkleys, to change their testimony by carrying back the date of the model one year from the date given in the interference proceedings. It is scarcely to be presumed that a witness would *unnecessarily* commit perjury. When perjury is committed it is generally in pursuance of a dire necessity required by some exigency of the case. There was no such necessity or exigency in this case, because July, 1903, was a sufficient date for plaintiff's purpose. Hence there could have been no motive for perjury. *But there was no change of testimony by*

the Dunkleys in respect of this matter, and the contention put forward by the defendants in that behalf is in our opinion the pure figment of an over-wrought imagination. Judge Van Fleet took no stock in the theory, for he says in his opinion (R. 697) that he was unable to find any essential difference in the testimony given on the two occasions.

But let us examine the facts on which the defendants predicate the alleged change of testimony. The best way to elicit the whole truth would have been to put in evidence the entire record in the Interference proceedings for comparison with the testimony in this case. The plaintiff was not entitled to put that record in evidence, but would have been very glad if it had been put in evidence. Defendants on the other hand were entitled to put it in evidence, but declined to do so. Instead thereof they read to the Dunkleys certain questions and answers and then asked them if they gave that testimony in the interference proceedings, to which they replied in the affirmative.

As regards S. J. Dunkley, he was asked on cross-examination if he did not testify in the Patent Office proceedings regarding his first experimental machine, that

“It was made in the month of July, 1903, and put together at the factory at South Haven, Michigan.”

As regards Melville E. Dunkley, he was asked if he had in the Patent Office proceedings identified a certain photograph and testified that

“It is a photograph of the frame and some parts of the original machine built during the summer of 1903, about which I have just testified.”

These questions were answered in the affirmative, and upon those answers defendants predicate their charge of change of testimony. As we have already remarked, the entire record was not produced. Hence it does not appear whether those answers were modified or affected by any other evidence in the Patent Office record. Defendants were careful not to put the record in evidence. The Dunkleys stated that in giving those answers they had in view the complete machine, that is to say, with a lye tank added. Since then they have unearthed the Clark letter of April 21, 1903, showing that the lye tank was built in April, 1903, and this letter refreshed their recollection of the transaction so as to enable them to now state that the frame work and spray part of the machine had been built before the lye tank, and in following the matter back they now recollect that the frame work and spray part were built in 1902. Until this Clark letter was unearthed the Dunkleys were not sure in their recollection that the frame work was built in 1902, although they were sure that it was in existence as early as July, 1903; therefore

in the Patent Office proceedings they were justified in fixing the date at least as early as July, 1903. But the Clark letter changed the situation somewhat and proved to them that the lye tank was built in April, 1903, and as the spray part was built and tested without the lye tank, it necessarily was built before April, 1903. In other words, the production of the Clark letter enabled the Dunkleys to remember that the spray part of the machine was built in 1902, and that a complete machine was installed with a lye tank added in July, 1903. Consequently, the present situation presents two alternatives, viz: In giving the interference testimony the Dunkleys either referred to the completed operative machine including a lye tank, or they were honestly mistaken in saying that the frame work was built in July, 1903, if such construction can be placed upon their testimony. Under the first theory there can be no pretense of a change of testimony. Under the second theory it is merely the case of an honest mistake, subsequently corrected by the discovery of record evidence. A witness is always allowed to correct an error inadvertently made, and it would be a very harsh rule to hold that such correction convicts him of perjury. We submit that there was in substance no change of testimony. Judge Van Fleet was of that opinion, and he had a much better opportunity to decide the matter than is afforded by a mere reading of this record.

He carefully considered all these matters and was

convinced that the Dunkleys were telling the truth, and ruled that there was no "essential difference" between the testimony of the Dunkleys given in this suit and that given in the Interference suit. We submit that there was no error in the ruling.

But after all, how will the defendants dispose of the testimony of Harvey C. Schau? He was superintendent of the Dunkley factory and worked for them from February, 1902, to March, 1908 (R. 513). Consequently, he was thoroughly familiar with the cannery and the operations carried on therein. He saw Mr. Dunkley experimenting with the matter in *July, 1902* (R. 514). He was in the South Haven cannery in *November, 1902*, saying that he was "very certain of that date" (R. 514). On that occasion he there saw in the cannery the frame work of this model machine, Exhibit No. 10, and identified the same in court (R. 514-15). He then testified that either the day before or the day after the 4th of July, 1903, he saw the complete machine at Kalamazoo and soon thereafter it was moved to South Haven and operated at the beginning of the peach season in 1903 (R. 515). He had charge of the machine room; consequently, had a good opportunity to see the machinery (R. 516).

Surely there can be no criticism as to this man's testimony. Indeed, none was attempted except the assertion that he was nineteen years old at the time. He is entirely disinterested, not being connected at

this time with the Dunkley interests. If he saw the machine without a lye tank in November, 1902, and saw it with a lye tank added, on July 4, 1903, then the Dunkley narrative is corroborated. When we add to this the Clark letter of April 21, 1903, regarding the lye tank, the proof becomes complete.

We can not leave this subject without voicing our disapproval of the intemperate language used by our adversaries at page 73 of their brief, where they quote a statement made by us at the oral argument below regarding this matter. It is true that we there made the statement that the testimony in the interference case was the same as the testimony in the case at bar. On its face this statement may appear to be too broad, but it was merely a statement made in oral argument by counsel which was not excepted to at the time, and which is not shown to have influenced the Court. It is not unusual in the heat of a verbal debate during a hotly contested case for an attorney to color his statements more vividly than he would in the seclusion of his office when writing a brief, and a charitable view to take would be to attribute his course to excessive zeal. But to attribute it to a deliberate intent to deceive the Court, and to characterize it as being "despicable and contemptible," and used for the purpose of "bolstering up a charge of false swearing made against honest men," so far exceeds the bounds of propriety as to be inexcusable. Much latitude may be accorded to

zeal and enthusiasm, but no justification can be made for a breach of decorum. We resent the charge with indignation, trusting that our long experience before this Court will justify the conclusion that there was no intent on our part to deceive the lower court.

Another criticism made against the Dunkleys is that they produced no written records. But counsel seem to have overlooked the testimony given by M. E. Dunkley at page 445 of the record, to the effect that in 1912 the Dunkley cannery was destroyed by fire and their records were lost.

THE STEWART CAMPBELL EPISODE.

Under the guise and pretense of meeting plaintiff's evidence as to the date of the Dunkley invention, defendants produced as a witness one Stewart L. Campbell, whose deposition appears between pages 523 and 595 of the record. The substance of his testimony is that Dunkley was not the inventor of the device patented, but that he, Campbell, was the sole and original inventor thereof.

Before considering Campbell's testimony we desire to call the Court's attention to the procedure under which it was produced. If Campbell was the inventor, then that fact should have been pleaded in the answer as required by section 4920 of the Revised Statutes, thereby giving us opportunity to prepare to meet it. But this was not done. Campbell's

claim to inventorship was not pleaded in any form whatever; instead thereof Campbell was produced at the trial without any previous notice and testified that he devised and erected the so-called Dunkley machine and was the inventor thereof. It seems apparent that the object of these tactics was to prevent us from preparing beforehand to meet the attack, the intention being to suddenly spring this witness upon us at the trial without any previous warning so as to catch us in a state of unpreparedness. Of course we could have objected to this procedure, but we did not object because our sole desire in the case was to elicit the truth, and we therefore allowed Campbell to tell his story without objection. That story as detailed by him is not worthy of belief and Judge Van Fleet so held.

Briefly stated, the record shows that Campbell prior to the time in controversy had returned from the Klondyke gold fields, where he does not appear to have found any gold, and thereupon entered the electrical business on a small scale at Kalamazoo, he being an electrician. That business does not appear to have been a success, and in 1902 he applied to Mr. Dunkley for employment. Dunkley employed him as an electrician to wire his private residence and later his factory at the small wage of \$60.00 per month. After that work was done he was put to work in the cannery developing a syrumping machine and a pitter, both of which were failures

(R. 456). He was neither a carpenter nor a machinist, but appears to have had more or less aptitude for thinking out new ideas. In our opinion he was one of those impracticable mechanical dreamers who never produce any useful results by their own efforts, but claim as their own the results produced by others. Such characters are numerous in the field of invention and they are generally looked upon as half demented. He claims that while in the Dunkley cannery, Mr. Dunkley, without advancing any original ideas, instructed him to build a peach peeling machine, telling him to go to another employee, Mr. Brunker, and get from him the details as to the strength of the lye solution to be used; that in pursuance of these instructions he designed, devised, and built the experimental model machine, plaintiff's Exhibit 10, in the latter part of the peach peeling season of 1903, and thereafter he designed and built a larger machine, and in the fall of 1904 he left the establishment forever, apparently being in high dudgeon with Mr. Dunkley for having refused to give him \$5,000 in money, which he says had been gratuitously promised him. It seems that he came to California in 1905 and has been living in Berkeley ever since.

Not only did he claim to have devised and invented the peach peeling machine for which Mr. Dunkley secured a patent, but he also made a similar claim in respect of all the machines, except one, in-

stalled and used in the Dunkley cannery and for which Mr. Dunkley secured the ten patents which were offered in evidence. He claims to have invented and designed all of these machines out of his own head.

After this case was begun, he allied himself with the defendants and was "employed" by them. Under their directions and at their expense and for the purpose of exploiting the defense he went to Chicago, then to South Haven, then to Kalamazoo, then to Lansing, then to Detroit, and then back home (R. 587). During these excursions he appears to have been accompanied by one of defendants' attorneys. Returning to California he made several visits to Sacramento for the purpose of securing a witness there by the name of Brunner. For his "services" in this case he was paid the sum of \$500.00 in cash and all of his traveling and other expenses (R. 594).

At the trial Judge Van Fleet personally subjected him to a rigid examination, giving him every opportunity to explain the inconsistencies and improbabilities disclosed by his testimony, and afterwards announced that he could not believe him. During the argument, when plaintiff's counsel was arguing against the credibility of his story, the Court interrupted by saying it was not necessary to dwell on Campbell's testimony, because it was too improbable for him to give it any credence (R. 690).

And in his decision of the case the learned Judge said, at page 699 of the Record:

"The main reliance by defendant in the evidence, is upon the testimony of the witness Campbell and that of the witness Brunker. I indicated at the trial, and my mind has been only confirmed in that view by my review of the evidence, that I could not extend the limits of my credulity sufficiently to put credence in the testimony of Campbell. That he worked for the plaintiff at or about the time that he claims, there is no question, but that the claim he puts forth as to what he did in the premises, and the time it was done, is entirely beyond my ability to believe. Brucker tends to corroborate him in certain respects, but it is not sufficient to change my conclusion on the facts."

We sum up Mr. Campbell's character by saying that in our opinion he is a soured, disgruntled, half-demented individual having a personal grudge against Mr. Dunkley and giving his testimony for money.

The witness Brunker was called to corroborate Campbell. He is another witness who was paid for his "services", having received \$35 in that behalf, as admitted in defendant's brief. It appears that in 1903 he solicited employment from Mr. Dunkley for the purpose of making strawberry jam, claiming that he had some mode or process of making the article which would prove remunerative. He was employed for that purpose, but the jam business proved a failure and was abandoned. He seems to

have hung around the cannery in the character of a general utility man until the fall of 1903, at which time he was paid \$200.00, besides some amounts which he had drawn during the interval, for his services of four or five months. He then left the employment of plaintiff and ultimately found his way to California, where he first served as a cook in a restaurant at Sacramento and later purchased a restaurant, which he has since been running as proprietor (R. 614).

He was an intimate friend of Stewart Campbell, and the two were roommates at Kalamazoo. He says that Mr. Dunkley instructed him to experiment with lye in order to discover the proper strength for its use in the contemplated peach-peeling machine, telling him to report results to Campbell, who was to build the machine; that he did report to Campbell and Campbell built the machine in the summer of 1903.

When he was asked in court to point out the machine referred to, he pointed out the wrong machine. At that time plaintiff's exhibit 10 and another peach-peeling machine were on exhibition in Court, and on looking around the room his eye fell upon the wrong machine and he promptly pointed to that machine as the one which Stewart Campbell built in 1903 (R. 69).691 .

And in giving his testimony he showed repeatedly that he had a poor memory. For instance, after

having testified that he went to South Haven at a certain time, he was shown a letter written from New York which indicated that he could not have been at South Haven at the time stated, and in explaining the matter he said that the letter produced surprised him very much, because he thought he had left New York earlier than that, and now he does not think he could have been at South Haven at the time originally testified to by him (R. 610-11).

Again, when he was asked regarding certain dates, he said (R. 629):

“A. You see, I can’t remember about the dates; I can’t give you any dates at all; the only dates I have tried to give you have been all wrong.”

And yet this man’s testimony is relied on for proving facts beyond a reasonable doubt. Our theory in regard to Mr. Brunner is that he is another disgruntled, disappointed, and unsuccessful man, an intimate pal of Stewart Campbell, and between the two of them they have framed up the story that Campbell was the inventor of the machine. It is possible that they assisted in building a peach peeling machine in August, 1903, because Dunkey says he built a second machine about that time, and if they worked on any machine it was probably this second machine. That is the most charitable view to take of their testimony; but that Campbell invented,

designed and built in August, 1903, the machine which Schau and the two Dunkleys say was built in the fall of 1902 is unbelievable.

Mr. Mapes was the third of the trio of witnesses called by defendants. He was a mechanic of Kalamazoo, and for years was doing machinery work for Mr. Dunkley, and while so working filed an application in the Patent Office for a patent on one of the Dunkley inventions whereby an interference was declared which resulted in favor of Mr. Dunkley. Thereafter, Dunkley gave no more machine work to Mapes. These facts serve to explain Mr. Mapes' attitude in this controversy. He produced a book showing machinery work done for Dunkley during 1903, and the contention of defendants is that this work was done on the model machine exhibit No. 10. It is to be remembered, however, that in the latter part of the season of 1903 plaintiff built a larger machine, and so far as these entries are concerned they may as well have referred to this second machine as to the first one. That is to say, there is nothing on the face of the entries themselves to show that they refer to the first machine. His testimony does not negative anything that happened in 1902, nor does it support the testimony of either Campbell or Brunker. It merely shows that he did machine work for Dunkley in 1903 on a machine of some kind, but does not identify the machine. Inasmuch as Mapes had been doing machine work

for Dunkley years prior thereto, it is highly probable that he did do this machine work in 1903, for that was before the episode of the interference and before Dunkley had ceased to patronize his shop; but it does not follow that this machine work was for the plaintiff's exhibit No. 10. If it was done at all, we assert that it was done for some other machine.

It appears that Mr. Mapes was not paid in cash for his "services" in this suit; but it does appear that he came from Kalamazoo to California for the purpose of testifying in this case in order to get a trip to California and was paid all of his "expenses." It does not appear what those "expenses" were, it being left merely to inference that they were of the legitimate kind.

Those three witnesses, Campbell, Brunker, and Mapes, were the only witnesses produced by defendants in respect of the matter now under consideration. Our contention is that all three of them are soreheads having a grudge against Mr. Dunkley, and are now trying to get even; that they embarked in this lawsuit from sordid motives, two of them for payment in cash, and the third for a trip to California from Kalamazoo.

On the other hand, we have the testimony of the two Dunkleys and Schau, the original machine, Exhibit No. 10, the Clark letter fixing the date of the lye tank, the issuance of the patent to Dunkley, the fierce contest of ten years through the Patent Office

where Dunkley was adjudged to be the first and original inventor, the extraordinary diligence of Dunkley in adapting and perfecting his invention and introducing it into public use, failure of Campbell to apply for a patent or even assert any claim to the invention until this controversy arose in 1915, coupled with his acceptance of a large cash consideration from the defendants. It is not to be wondered at that Judge Van Fleet found Dunkley to be the true and original inventor.

DEFENSE OF SURREPTITIOUS PATENTING.

This defense begins at page 35 of defendant's brief, and is in substance that Dunkley surreptitiously obtained the invention from Grier and patented it as his own invention.

Section 4920 of the Revised Statutes provides for such a defense, where it alleges that a defendant may prove:

"That he (the patentee) had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same."

The substance of this defense is that Dunkley was not an inventor at all, but that Grier was the inventor, and that Dunkley in some way or other acquired knowledge of the Grier invention and surreptitiously

or unjustly appropriated the same and secured a patent therefor in his own name and as his own invention, while Grier was using reasonable diligence in adapting and perfecting the same. Of such a defense *Walker on Patents* says in Section 451:

“Such a patent is surreptitiously obtained where the patentee appropriates the idea from the first conceiver, and, exceeding him in speed, reduces the invention to proper form, and secures the patent, while the first conceiver is diligently laboring to adapt the invention to use.”

The word “surreptitiously” means secretly, fraudulently, clandestinely, stealthily. Consequently, in order to maintain this defense the defendants must show some such factor.

There is no showing here that Dunkley was guilty of any such conduct. It is not even claimed or pretended that he obtained knowledge of the invention from Grier or from the Grier use. Indeed no such contention could be made because Grier resided in Los Angeles and Dunkley in Kalamazoo, some three thousand miles apart, and Dunkley did not know of the existence of such a man as Grier. The contention, therefore, that Dunkley secretly acquired knowledge of the invention from Grier and *surreptitiously* obtained a patent for Grier’s invention is too preposterous for consideration.

It may be that in putting forward this defense defendants intended merely to contend that although

Dunkley was an independent inventor, nevertheless Grier was the prior inventor and was using reasonable diligence in adapting and perfecting his invention. If that is the contention, then it cannot be made under the statutory defense we are now considering.

We contend that the question of relative diligence does not arise in this case, because Grier never applied for a patent. That matter has been treated by my associate. But even if the question were a proper one for consideration, only one conclusion could be reached, viz., that Dunkley's diligence was superior to that of Grier.

Their respective operations appear to have been very nearly contemporaneous, and of course if they were merely contemporaneous, Dunkley must prevail, because Grier never applied for a patent.

Plaintiff's testimony shows that Dunkley conceived the invention in the summer of 1902; made an experimental model, but without a lye tank, in the late summer or early fall of 1902; experimented with that model to his entire satisfaction and determined to build a complete machine for the next season; in April, 1903, purchased a lye tank to be used in connection with the experimental machine; on or about July 15, 1903, coupled up the lye tank with the machine so as to complete it ready for operations; immediately thereafter began to use the machine on early Georgia peaches with success; continued to use that machine during the peach season of 1903; finding

that machine insufficient as to capacity, built another machine in the summer of 1903, a complete operative structure on a larger scale, and used it for the remainder of the peach season of 1903; in 1904 built more of the machines; in November, 1904, applied for his patent; in 1905 built more machines, some of which were sent to Chico, California, and ever since then has been building machines, and has large numbers of them scattered throughout the country; prosecuted his application for a patent in the Patent Office for ten years in the face of fierce opposition; was in interference with a rival inventor; had hearings in all of the tribunals of the Patent Office and finally secured a decision by the Court of Appeals of the District of Columbia in his favor in January, 1913; secured the issuance of his patent in July, 1914; shortly thereafter commenced these eight suits now before the Court; had a trial of the cases in open Court for six days, where large numbers of witnesses were examined, secured an interlocutory decree in his favor, and is now before this Court on appeal.

Now let us review Mr. Grier's record. Giving to his testimony the utmost that can be reasonably claimed for it, even by himself, it would appear that he conceived the invention in the summer of 1902; that in April, 1903, he began the building of two machines; that on July 28th or 29th, 1903, the two machines were tested; that the tests showed

them to be deficient in certain particulars, which were afterwards remedied; that in August, 1903, one of them proved deficient by reason of want of water pressure and on August 3d a pump was purchased for the purpose of increasing the same; that thereafter, during the peach season of 1903, these two machines were used; that in the year 1904 two other similar machines were built, one going to Anaheim and the other to Pomona; that the Anaheim machine was used until 1913, when it was destroyed by fire; that the Pomona machine was used for a year or two and then abandoned (R. 316); that he never applied for a patent on the invention, although he secured patents on several other inventions in the fruit canning art; that after the issuance of the Dunkley patent, in 1914, when he was notified by plaintiff of infringement, he discontinued the use of his machine at Pasadena and dismantled it; that thereafter he immediately proceeded to devise a new machine for *washing* peaches without the use of sprays, for which he promptly obtained a patent; that he has continued to use this *washing* machine to the present time.

It requires no argument to show from the foregoing record that Dunkley is entitled to the award of superior diligence. If, therefore, the matter is reduced to a contest between Dunkley and Grier as to reasonable diligence, which seems to be a point urged by defendants in their brief, then the

decision must be in Dunkley's favor. Dunkley has exhibited unusual diligence, extending over a period from the date of his initial conception in 1902 to the issuance of this patent in 1914, a period of twelve years; whereas Grier has not only failed to show such reasonable diligence, but has been slothful and negligent. If he ever had any rights he has slept on them. Had he filed his application for a patent, he would have been thrown into interference with Dunkley, just as Beekhuis was, and the matter could have then and there been settled. On the contrary, he goes to sleep for twelve years and then suddenly awakes and claims rights of invention superior to those of Dunkley.

AS TO THE ALLEGED FRESNO PRIOR USE.

This can be easily disposed of. It is true that a machine was installed and used at Fresno by the California Fruit Cannery Association in 1902. It was designed, erected, and used under the supervision of a man named Vernon. Hence it is called the Vernon machine. That machine operated on a different principle from Dunkley's. It was adapted from the old orange washing and scrubbing machine which had been used for many years in Southern California to scrape the dirt from the surface of oranges. It conveyed the fruit between a pair of rotary brushes at a very slow rate of speed, which

gave sufficient time for a thorough scrubbing. A water pipe was arranged to supply water, which we say was for the purpose of moistening the brushes so as to reduce their harshness and also to moisten the dirt on the fruit so as to make it more easily removable. We claim that there was no peeling by water jets or sprays, and the dimensions of the pipes sustain this contention. That the water used was insufficient to produce peeling jets is proven by the fact that in 1904 a pump was put in for the purpose of creating such water pressure as to produce sprays for peeling peaches, and also by the fact that when the California Fruit Canners' Association undertook to duplicate this machine at their other canneries during the succeeding year, under the supervision of Mr. Beekhuis, they put in peeling jets and sprays. It would appear from the facts to be a logical conclusion that the Fresno machine of 1902 did not utilize peeling jets, but peeled the fruit on the scrubbing principle, and that in the next year Beekhuis, noting the defect, conceived the idea of using peeling jets, which he introduced in the subsequent machines for the California Canners, and he applied for a patent thereon. But the interference case decided that Dunkley's invention was prior to Beekhuis.

And finally, Vernon himself, though dead, left conclusive evidence in our favor. He designed, devised, and constructed the Fresno machine, and, therefore,

he ought to be the person best qualified to describe it. After designing and constructing said machine he immediately proceeded to apply for a patent thereon. The application is dated November 22, 1902, and the patent was issued March 7, 1905. It appears at pages 742-4 of the record, where a drawing of the machine is shown and a description of its construction is given. *It shows no peeling jets or sprays of any kind whatever*, but shows a machine operated on the scrubbing principle as we have heretofore described it. It is there designated as a "brushing machine", and its mode of operation is to brush the skin of the fruit. In passing upon this issue the Judge of the Lower Court says (R. 697) :

"As to the Vernon device, it had been in use in Fresno as early as 1902 or 1903. I am unable to hold that that device was an anticipation in its essential characteristics. It operated upon a fundamentally different principle. That was an adaptation to the purposes for which the plaintiff's device was used, that of peeling peaches, of a device by Baker and another for scouring oranges for the market; it had a system of revolving brushes, and it used a saturation or douche of water for the purpose of softening the brushes and of washing the fruit; but the essential operative principle there was the brushes. They were for the purpose of scrubbing and washing the hard outer surface of the skin of the orange and of freeing it from mould and other detrimental substances which interfered with its marketability, and the essential principle was the operation of

the brushes. The water was used, as I have suggested, only for a saturating and washing purpose. I may say, furthermore, that the patent itself did not call for the essential feature which I find characterizes the plaintiff's device, that is, of peeling jets of water, or water admitted at such a high pressure upon the fruit as to act itself as the primary means of washing the skin from the fruit; nor do I think that the manner in which the Vernon patent was used was such as to suggest readily to the mind the idea that peeling jets of water would be efficient for the purpose for which the plaintiff's device was intended. The plaintiff's device operates upon quite a different principle. It has the rotating brushes, but has these peeling jets of water, which are themselves the efficient means of washing off the disintegrated skin of the peach after it has been put through the lye process, and the brushes serve the subsidiary purpose of agitating the fruit and of turning it for the purpose of presenting its different surfaces to the jets of water to enable them to do the efficient work of cleansing the skin after its disintegration by the lye bath; and I am therefore unable to hold that the Vernon device, which was subsequently patented—I think in 1905—can be regarded as an anticipation of the device or the conception embodied in the plaintiff's patent."

DEFENSE OF UNCLEAN HANDS.

The gist of this defense is stated to be that the plaintiff knew of the two years' prior use at Fresno, and for the purpose of making it as difficult as

possible for any defendant who might be sued to prove such use in an infringement suit, plaintiff issued a free license to the California Fruit Cannery Association, coupled with an agreement that said association should align itself with the plaintiff and put obstacles in the way of any one attempting to prove such prior use.

The only true fact in this indictment is the issuance of a free license to the California Fruit Cannery Association. The record does not show the reason for issuing such license, and the defendant only assumes that it was for the purpose charged. There may have been good business reasons for issuing that license at the time in question (May 22, 1914), in view of the fact that said association was a large and well-known dealer in canned goods. Surely a patentee has a right to issue licenses under his patent upon such terms as he sees fit.

Now as to the other portion of this defense, that the license was coupled with an agreement to put obstacles in the way of anyone attempting to prove the alleged prior use, the defendants called as a witness ROBERT I. BENTLEY, the general manager of the California Fruit Cannery Association, who testified that there was no such agreement (R. 226). No other evidence was introduced on the subject, and this defense of unclean hands then and there collapsed, and was not afterwards heard of. It appears

to have been a mere surmise and conjecture on the part of defendant's counsel which failed of realization. Indeed, it does not appear to be insisted on in defendant's brief, though it is formally stated at page 13.

We submit that Justice was done by the Lower Court and that its decree should be affirmed.

Respectfully submitted.

JOHN H. MILLER,
Counsel for Appellee.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CENTRAL CALIFORNIA CANNERIES COMPANY,
Appellant.

GRIFFIN & SKELLEY COMPANY,
Appellant.

J. C. AINSLEY PACKING COMPANY,
Appellant.

ANDERSON-BARN GROVER MANUFACTURING
COMPANY,
Appellant.

GOLDEN GATE PACKING COMPANY,
Appellant.

J. F. PYLE & SONS, INC.,
Appellant.

HUNT BROTHERS COMPANY,
Appellant.

SUNLIT FRUIT COMPANY,
Appellant,

vs.

DUNKLEY COMPANY,
Appellee.

No. 2915.

PETITION FOR REHEARING

WILLIAM K. WHITE,
FREDERICK S. LYON,
KEMPER B. CAMPBELL,

Solicitors and Counsel for Defendants-Appellants.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CENTRAL CALIFORNIA CANNERIES COMPANY,	Appellant.	} No. 2915.

GRIFFIN & SKELLEY COMPANY,	Appellant.	

J. C. AINSLEY PACKING COMPANY,	Appellant.	

ANDERSON-BARNGROVER MANUFACTURING COMPANY,	Appellant.	

GOLDEN GATE PACKING COMPANY,	Appellant.	

J. F. PYLE & SONS, INC.,	Appellant.	

HUNT BROTHERS COMPANY,	Appellant.	

SUNLIT FRUIT COMPANY,	Appellant,	

vs.		
DUNKLEY COMPANY,	Appellee.	

Petition for Rehearing.

The defendants-appellants feeling themselves aggrieved by the decision herein rendered by this Honorable Court on October 1, 1917, come now and respect-

fully petition the Court for a rehearing of this cause, upon the grounds hereinafter set forth.

REJECTION OF CAMPBELL'S TESTIMONY.

Regarding Campbell's testimony, the Court says:

"In other words, his testimony is to the effect that he was the designer of the invention for which Dunkley received a patent. But defendants insist that the testimony of this witness was not introduced to prove that fact, and they refer to their answer as showing that it was not so pleaded as a defense. The purpose of this testimony, they say, was to discredit the claim of Dunkley that he was the inventor, and not to offer the defense that Campbell was the inventor. But the testimony of Campbell upon that question was material and relevant to the issue before the court, and was either true or not true. If true, Dunkley was not the inventor of the device claimed as his invention, and that would end the case. If Campbell's testimony was not true, he was testifying falsely concerning a material and relevant matter, and his testimony would for that reason be wholly rejected. *Falsus in uno, falsus in omnibus*. But the defendants say they offer it only to prove that Dunkley was not the inventor. They stand on the priorities set up in their answer as defenses, namely, the priority of the Vernon patent for a process for peeling fruit and the Grier device for an apparatus used in conducting that process. They deny the priority of the Dunkley peach-peeling machine and offer the testimony of Campbell to prove that fact. This they cannot do. They cannot offer this testimony as true to prove a material and relevant fact for one purpose, and discredit it for another purpose. If it is true for one purpose it is true

for any purpose. And as the defendants have refused to commend the testimony of this witness to the court as true for a purpose to which it was relevant and material, we must reject it for the purpose for which it was offered, namely, to fix the date of the Dunkley constructed machine in 1903 instead of 1902."

In justice to Campbell and in justice to ourselves, we respectfully and most earnestly protest against the inclusion, in the decision, of said statements to the effect that we have discredited Campbell's testimony for any purpose or have refused to commend it to the Court for all purposes. We respectfully submit that no part of our argument is susceptible of the construction so placed on it.

The foregoing remarks of the Court are obviously based on that part of our argument commencing on page 151 of our Opening Brief and reading as follows:

"Campbell stated that he designed certain of the said machines so built by him and his contention, in that regard, was said by the lower Court to be incredible. Of course, it is absolutely immaterial in this case, whether or not Campbell was the inventor of any of said machines, even the peach-peeling machine. Whether he or Dunkley conceived said machine in August, 1903, is of no moment. Prior to that time, Grier had two anticipating machines in commercial operation in California. Therefore, defendant made no effort in this case to establish the fact that Campbell was the one who actually did design the Dunkley peach-peeler, although admittedly Dunkley told

him generally to build such a machine to do the work which Bruncker had done by hand, to wit: remove the disintegrated skin from the peach by subjecting it to the action of brushes and water. That Campbell certainly worked out the details of construction of the peach-peeling machine, is shown by the testimony of the two Dunkleys, both of whom were unable to give such details. S. J. Dunkley's ignorance regarding such details is indicated by the following answers given by him.

" 'MR. WHITE—I direct your attention to this "Plaintiff's Exhibit No. 10" and ask you what function in the operation of the machine, did these gears perform which are on the shaft on which the pulley at the other end of the machine, is mounted?

" 'A. I presume, if there is gears there, to help turn the brushes.

" 'Q. Do you know?

" 'A. No, I do not know, it is a simple enough machine; anybody could judge by looking at it' (R. 496).

"The following is an example of Melville Dunkley's recollection of such details of the model machine:

" 'Q. As a matter of fact, it was driven by a friction gear, isn't that correct?

" 'A. I don't know; I could not say; I have an idea it was driven by gears; but as to the manufacture, I could not remember' (R. 436).

"It is sometimes a close question as to who is the real inventor of a very simple machine; the man who suggests the general idea of making such a machine to perform a certain function, or the man who, from such a suggestion, combines together the necessary, but very simple, mechanical elements and movements to perform such function. Either might well contend and honestly contend,

he was the inventor. Therefore, no emphasis was placed on Campbell's contention that he designed the Dunkley peach peeler. *We believe his testimony, in that regard, is absolutely true*, but, as a defense, said contention was not relied on herein and was not pleaded. However, it very naturally was disclosed by Campbell when he was giving the history of the Dunkley peach peeler. Even though the lower Court was unable to give credence to such contention, there was no reason for it to reject the whole testimony of Campbell by reason thereof. As Campbell actually built the first two peach-peeling machines and must have supplied many of the details of construction thereof, the lower Court could at least have taken the view, that it was not an unnatural thing for him to really believe he invented the same, although as a matter of law, it might be considered that Dunkley's general suggestion was sufficient to constitute him the inventor.

"That Campbell had the ability to invent the peach-peeling machine is admitted by the Dunkleys. As stated by Melville Dunkley, Campbell was known '*as more or less of a genius*,' and was *actually employed to invent and develop new machines* (R. 456). Furthermore, it was admitted that Campbell invented machines far more complicated than the extremely simple peach-peeling machine, and it was not denied, that practically all his time was devoted to the designing and building of new machines."

From our point of view, our statement that "*We believe his testimony in that regard is absolutely true* . . ." is the highest commendation we, personally, can give to the testimony of any witness.

Under all the decisions of which we have any

knowledge, the mere testimony of a single witness to the effect that he, and not the patentee, was the inventor of the device covered by the patent issued to such patentee, is insufficient to prove the invalidity of the patent.

What was said by Dunkley, at the time he admittedly instructed Campbell to build a machine to do the work Bruncker had been experimentally doing by hand, is, of course, known only to Dunkley and Campbell. Whether or not, Dunkley's instructions could be deemed sufficiently comprehensive to constitute a disclosure of the inventive idea of means, is known only to Dunkley and Campbell. Therefore, it would have been an idle and futile thing for defendants to have pleaded or urged the defense that Campbell was the real inventor.

Our words: "*We believe his testimony, in that regard, is absolutely true . . .*," are certainly words of commendation. There can be no question as to that fact.

The Court's rejection of his testimony, therefore, can have no basis other than the fact that defendants refrained from doing an idle and futile thing.

We respectfully submit that the application of the maxim "*Falsus in uno, falsus in omnibus*" to such a situation is without precedent and finds no support in logic or in human experience.

At all times during this litigation, we have been willing and we are now willing to commend Camp-

bell's testimony to this Court as true. It is, therefore, most surprising to us to find the Court construing our attitude and our references to Campbell's testimony in the manner set forth in the decision.

We respectfully urge the Court to consider the justice of condemning a witness as unworthy of belief simply because the attorneys, calling him to the stand, have failed or refrained from pleading or urging some defense in support of which a portion of his testimony is material but, even though believed to be true, is insufficient in law to sustain.

We respectfully urge the Court to consider the justice of proclaiming to the world a witness is unworthy of belief because of an inference drawn, *not from anything done or said by the witness*, but from the words and conduct of others over whom the witness has no control.

Surely, such a vicarious punishment cannot appeal favorably to this Court's sense of justice and we, therefore, hopefully believe the wrong will be rectified.

DECISION HEREIN CONFLICTS WITH DECISION OF COURT
OF APPEALS FOR DISTRICT OF COLUMBIA.

We respectfully submit that the decision of this Honorable Court is in conflict with the decision of the Court of Appeals for the District of Columbia in the Dunkley-Beekhuis Interference in respect to questions of law and of fact.

I.

CONFLICT IN RESPECT TO QUESTIONS OF FACT.

Under the authority of *Westinghouse Electric & Mfg. Co., v. Stanley Instrument Co.*, 133 Fed., 167, cited and quoted from on page 16 of our reply brief, we filed with the Clerk of this Court, a copy of the record on behalf of Dunkley in said interference.

In the Dunkley-Beekhuis interference decision, the Court of Appeals says:

“All the tribunals of the office found that Dunkley was the first to conceive and reduce to practice, provided he was entitled to make the claims of the issue and this decision was undoubtedly right.”

The foregoing general findings of fact were based upon the *undisputed* and uncontradicted proofs offered on behalf of Dunkley. Those proofs included a *complete* history of the Dunkley invention.

According to said *complete* history of the Dunkley invention, the *first* machine, embodying said invention, was not built until 1903 during the period when defendants' witness, William Brunker, was admittedly at South Haven.

The said findings of fact of the Court of Appeals for the District of Columbia are, therefore, to the effect that Dunkley's *first* machine was built in 1903 at a time when William Brunker was admittedly at South Haven.

This Court, in accepting as true the Dunkley testi-

mony herein, necessarily finds that Dunkley's *first* machine was built in August, 1902, *almost a year before Brunker was ever employed by the Dunkley Company.*

This Court, we respectfully submit, in so finding that Dunkley's *first* machine was built in August, 1902, necessarily rejects, as untrue, the Dunkley 1910 testimony in the Dunkley-Beekhuis Interference to the effect that *the same identical machine* was built in 1903, at a time when William Brunker was at South Haven.

When the two Dunkleys were on the stand herein, they admitted giving their 1910 interference testimony to the effect that the *first* Dunkley machine was built in 1903.

In addition to considering their said interference testimony so repeated to the Dunkleys, when on the stand herein, we respectfully submit this Court is entitled, according to the decision in said case of *Westinghouse Electric Mfg. Co. v. Stanley Instrument Co., supra*, to consider the Dunkley Interference record on file with the Clerk.

HISTORY OF DUNKLEY PEACH-PEELING MACHINES.

Portions of the Court's decision indicate that we have heretofore failed in our efforts to clearly set forth the facts and explain our contentions in respect thereto. We, therefore, deem it necessary to again refer to matters mentioned in our previous briefs.

It is admitted that, prior to November 1, 1904, only two peach-peeling machines were built by Dunkley.

It is admitted that the *first* machine built was the so-called model machine, the wooden frame of which was offered in evidence as "Plaintiff's Exhibit No. 10" (R. 480).

It is admitted that said model was a *single line* machine; that is, it embodied but *one* brush carrier or belt for conveying the peaches between the two brush rolls and the perforated pipes associated therewith.

It is admitted that the *second* machine built, was the so-called commercial machine, a photograph of which is in evidence as "Defendants' Exhibit S."

It is admitted, as shown in such photograph reproduced opposite page 141 of our Opening Brief, that the *second* machine was a *three line* machine; that is, it embodied *three* separate brush carriers or belts, each of which conveyed peaches between two brush rolls and the perforated pipes associated therewith.

It is admitted that a lye-tank was built for and used with such *commercial* machine.

The Dunkleys admit that no other peach-peeling machines, embodying the Dunkley invention, were built before November 1, 1904 (R. 448 and 501).

In the Dunkley-Beekhuis Interference, the Dunkleys were asked for the *complete* history of the Dunkley invention.

In giving such complete history of the invention, neither the Dunkleys nor any witness called on their behalf, even remotely suggested or intimated that any peach-peeling machine or device or part of any such machine or device or any model or part of a model, embodying the Dunkley invention, was made, bought or used prior to the period of William Brunker's employment, in 1903, by the Dunkley Company.

On the contrary:

Dunkley, the patentee, in 1910, swore that the *first* machine, completely and accurately identified by him as the small model and being a *single* line machine, was built in 1903 at a time when William Brunker was admittedly at South Haven. Dunkley also identified a photograph of the *wooden frame* of said model machine, a duplicate of which photograph is in evidence as "Defendant's Exhibit R" (R. 485-489).

Melville Dunkley, the patentee's son, also, in 1910, swore that the same identical *single* line model machine, admittedly the *first* machine built, was made in 1903, at a time when William Brunker was admittedly at South Haven in the Dunkley Company's employ (R. 441).

Melville Dunkley, in 1910, also swore that, at the time said identical *single* line model machine was built at South Haven, William Brunker, Stewart Campbell and Fred Brown were working there and any of them might have worked on it.

Abraham Verhage, in 1910, also swore that the said

single line model machine was made in 1903 at a time when William Bruncker was at South Haven.

VERHAGE TESTIMONY CLENCHES DEFENDANTS'
CONTENTIONS.

The wooden frame of Dunkley's *first* machine, to wit: the *single* line model machine, is in evidence in this case as "Plaintiff's Exhibit No. 10." A photograph of said wooden frame is in evidence as "Defendants' Exhibit R." Said photograph, Exhibit R, is a duplicate of the photograph marked "Dunkley's Exhibit No. 1, Photograph of *Frame of First Dunkley Machine*" offered in evidence on behalf of Dunkley in the Dunkley-Beekhuis Interference.

In the said interference, Verhage testified as follows:

"Q. 10. Will you indicate *about the time*, so near as you can remember, that the *first wooden frame was made*?

"A. *July, 1903.*

"Q. 11. What did you know about the machine in July, 1903, or did you see it or have anything to do with it?

"A. I did not have anything to do with it. I saw it but did not have anything to do with it.

"Q. 12. Where did you see it?

"A. South Haven.

"Q. 13. Any particular place there, do you remember that you saw it?

"A. I do not recollect any.

"Q. 14. At what plant was it that you saw it, that you remember?

"A. At the plant of the Dunkley Company.

"Q. 15. At what place in the plant was the machine set up?

"A. *It was first set up in the basement in the north wing.*

"Q. 16. *Who set it up there, if you know?*

"A. *Mr. Campbell and myself.*

"Q. 17. Did you see the machine work after it was set up.

"A. Yes sir.

"Q. 18. Did it peel peaches successfully?

"A. Yes sir.

"Q. 19. Please state the way in which the machine did the work, indicating *the parts of the machine*, and how *they* worked, as well as you are able and as well as you remember.

"A. Well, we had *a belt* with brushes and *two* rotary brushes, which was used as a carrier to carry the peach through and keep the peach revolving. Then, there was *three* perforated pipes that did the peeling, after *they went through the lye process.*

"Q. 23. I show you a photograph, 'Dunkley's Exhibit No. 1, Photograph of *Frame of First Dunkley Machine*,' and ask if you are able to identify it?

"A. Yes, sir.

"Q. 24. State what it is from what you know about the subject.

"A. *It is the first frame that was built, the first machine operated."*

It is to be noted that, in 1910, Verhage testified that the *wooden-frame* of Dunkley's *first* machine was made in 1903 at a time when William Brunker admittedly was at South Haven. *Verhage's testimony cannot be disposed of on the ground that he was talk-*

ing about some machine other than Dunkley's first machine. He identified a photograph of such wooden-frame and *the same identical wooden frame*, shown in such photograph, has been offered in evidence in this case by the Dunkley Company and identified by the Dunkleys as being *the wooden-frame of the first machine ever built by Dunkley* and embodying the invention covered by the patent in suit.

In his 1910 testimony in said interference proceeding, Melville Dunkley also identified the said photograph of such wooden-frame and also testified that the frame was a part of the original machine built in 1903. His testimony is as follows:

“MR. WHITE—Q. Mr. Dunkley in Interference No. 30,610, between Samuel J. Dunkley and H. A. Beekhuis, did you testify as follows regarding a photograph, a duplicate of which has been introduced in evidence as ‘Defendants’ Exhibit R’ to wit:

“‘Q. 28. I show you a photograph and ask you if you are able to recognize the same and tell me what it is?

“‘A. Yes, sir. It is a photograph of the *frame* and some parts of the *original machine built during the summer of 1903*, about which I have just testified.’

“THE WITNESS—Yes” (R. 441).

We respectfully submit that, in accepting the Dunkley testimony herein as true, the Court must necessarily reject, as false, the 1910 testimony of the two Dunkleys and Verhage.

As said 1910 testimony was adjudged true by the decision of the Court of Appeals for the District of Columbia, it follows there is a conflict between that decision and the decision herein in regard to a question of fact.

BRUNKER'S TESTIMONY.

Brunker's testimony is apparently disposed of in the following statement of the Court:

"But accepting Campbell's testimony as true in those particulars wherein he is corroborated by other witnesses, we find he worked for Dunkley on a machine of some kind in 1903, but this does not identify the machine as the one Dunkley claims to have invented in 1902, nor does it tend to prove the machine as Campbell's invention."

As before stated, *it is admitted that, prior to November 1, 1904, only two peach peeling machines, embodying Dunkley's invention, were built by him.*

The first machine, built by Dunkley, was a *single* conveyor machine.

There was only *one* single conveyor machine built at any time by Dunkley.

The *second* machine built by Dunkley was a *three* line machine—that is, it embodied *three* carrier conveyor belts.

These were the only Dunkley machines in existence prior to November 1, 1904.

These two machines are clearly described, distinguished and identified by Campbell.

Defendants' witness, Bruner, was employed at South Haven by the Dunkley Company during the period commencing the latter part of June, 1903, and ending the latter part of October, 1903. He was never there at any other time.

We respectfully submit that Bruner's identification of the peach peeling machine, built while he was at South Haven, is full and complete.

He clearly identified said machine as one embodying only a *single* conveyor belt, and, admittedly, the *single* conveyor machine was the *first* machine ever built by Dunkley. Regarding said machine Bruner, on cross-examination, testified:

"XQ. How many of the *conveyor belts* were there in the machine when it was completed?

"A. Conveyor-belts?

"XQ. Yes?

"A. There was only *one* conveyor belt; we had no line conveyor, just the machine" (R. 622).

We respectfully submit that Bruner's recital of the circumstances leading up to and surrounding the building of said *single line* machine, necessarily shows it was the *first* Dunkley machine ever built by Dunkley.

In view of the 1910 testimony of the two Dunkleys and of Verhage to the effect that Dunkley's first machine, to wit: the single-line model machine, was built in 1903, while Bruner was at South Haven, why should Bruner's 1916 testimony to the same

effect be rejected as untrue or improbable or indefinite or uncertain?

II.

CONFLICT IN RESPECT TO QUESTION OF LAW.

We respectfully submit that the decision herein conflicts with the decision of the Court of Appeals for the District of Columbia in respect to a question of law to wit: *the proper interpretation of the Dunkley "peeling-jet" claims.*

Those claims were allowed to remain in the Dunkley application because the Court found that, in the Dunkley machine, the water spray "*entered into the operation of removing the skins*" and *not* because the water-spray or jets were the exclusive means for removing the skins. On the contrary, the Court found that, in the Dunkley machine, the water spray or jets were *not* the exclusive peeling means.

In construing the counts of the interference, which are now the Dunkley patent claims in issue in this cause, the Court said:

"But let it be conceded that Dunkley was not fully aware of the effective action of the jets of water and *relied chiefly upon the action of the brushes to remove the skin*: . . . The counts of the issue are satisfied by a construction in which peeling water jets *enter into the operation of removing the skins* whether they be exclusively employed to remove the skins or not."

By placing the foregoing meaning and construction upon the counts, the Court was able to find that the Dunkley machine "satisfied" the counts and embodied the subject-matter thereof.

It logically follows that any *prior* machine "satisfies" and embodies the subject-matter of the counts, now the Dunkley patent claims, if such prior machine embodies "water-spray" or "water jets" which play upon the peaches and "*enter into the operation of removing the skins*" thereon.

According to the testimony and admissions, given and made on behalf of plaintiff, the Vernon machine necessarily embodied water-spray or jets that "*entered into the operation of removing the skins.*"

The question of anticipation by the Vernon machine is a question of law.

All the facts, necessary to a determination of such question of anticipation, are established by plaintiff's testimony and admissions.

In passing on such question of anticipation, it is unnecessary for the Court to consider any testimony or proofs on behalf of defendant or consider any disputed fact.

Aside from the *time factor*, questions of anticipation and of infringement are the same. It is established that the question of infringement is sometimes merely a question of law. In *Singer Company v. Gramer*, 192 U. S., 275, the Supreme Court said:

"As in each of the patents in question it is ap-

parent from the face of the instrument that extrinsic evidence is not needed to explain terms of art therein, or to apply the descriptions to the subject-matter, and as we are able from mere comparison to comprehend what are the inventions described in each patent and from such comparison to determine whether or not the Diehl device is an infringement upon that of Cramer, the question of infringement or no infringement is one of law and susceptible of determination on this writ of error. *Heald v. Rice*, 104 U. S., 737; *Market Street Cable Ry. Co. v. Rowley*, 155 U. S., 621, 625."

PLAINTIFF'S PROOFS AND ADMISSIONS REGARDING VERNON MACHINE.

In our discussion of the Vernon machine, commencing at page 53 of our reply brief, we referred to certain quotations from the testimony of plaintiff's witnesses and from the statements of plaintiff's attorneys which, in our opinion, proved the presence, in the Vernon machine, as *commercially* used for two years, of all the elements of the Dunkley machine, including the "*peeling jets*" as defined by the Court of Appeals for the District of Columbia.

Briefly, the facts, admitted and established by *plaintiff's* proofs, are

The presence, in the Vernon machine, of every mechanical element of the Dunkley machine *including the perforated spray-pipe over the carrier belt.*

The *natural* water pressure at Fresno was from 35 to 37 pounds (R. 686).

The water issued from such perforated pipe in the form of *spray*. [Note: This impossible, unless water under pressure.]

The peeling effect of the spray or jets varies according to the strength of the lye-solution.

Brushes, *alone*, are incapable of removing the disintegrated skins to an extent sufficient to turn out a *merchantable* product.

The peeling effect of the water spray or jets is *absolutely essential* to the turning out of a *merchantable* product.

The Vernon machine was *commercially* used two years.

That, in 1903, two or three more of said machines were installed and used by the California Fruit Canners Association.

We respectfully submit that, from the foregoing premises, only one conclusion can be drawn, to wit: that the water spray or jets, in the Vernon machine, "*entered into the operation of removing the skins*" and, therefore, must be held to be "peeling jets" within the meaning of that term as defined by the Court of Appeals for the District of Columbia.

DUNKLEY PEACH PEELING TABLE.

In the Court's decision, it is said:

"According to the testimony of this witness, he designed and built, in August, 1903, a peach-peeling *table* for which the plaintiff obtained the pat-

ent in suit, and this he did without any ideas from Dunkley as to its construction."

We respectfully submit that the foregoing statement indicates a serious misunderstanding of defendants' contentions and of Campbell's testimony.

The peach-peeling *table*, referred to by Campbell and Brunker, did *not* embody the invention covered by the patent in suit. A photograph of such table appears opposite page 99 of our opening brief. Such table was built by Campbell in July and August of 1903 for the purpose of being used by the women engaged in peeling peaches *by hand*.

It was eighty or ninety feet long and fifty or more women are shown, in such photograph thereof, peeling peaches *by hand*.

The building of this immense *hand* peeling table in July and August of 1903 and the fact that the Dunkley Company incurred the large expense of so building it at that time, were *circumstances* urged by us as showing that, at that very time, Dunkley did not have the peach-peeling *machine* covered by the patent in suit.

Such machine was designed for the purpose of doing away with *hand* peeling. Therefore, if Dunkley had such a machine in July, 1903, he would not have gone to the useless expense of building such immense *hand* peeling table.

In 1904, when he did have his first commercial peach peeling *machine*, most of the said *hand* peeling

table was removed and only twenty or twenty-five feet left as an *inspection* table on which the peaches were inspected after leaving the said commercial peach peeling machine. A photograph of such commercial peach-peeling machine is reproduced opposite page 141 of our opening brief. As said before, it was a *three* line or brush belt machine.

Campbell admittedly left the Dunkley Company's employ about September 1, 1904. The Court's decision erroneously fixes the date as December, 1904. The date of his leaving is most important because he testified that about the *last thing* he did was to complete and test the first Dunkley *commercial* machine. In other words, Dunkley's first peach peeler was the small *model* and the second was the three line *commercial* machine. Campbell left before such *commercial* machine was ever put into regular commercial use.

As Campbell admittedly left the Dunkley Company about September 1, 1904, and as he fixes the date of completion of Dunkley's first *commercial* machine by his date of leaving, there is no opportunity for him to be mistaken as to such date.

CONCLUSION.

In conclusion, we desire to call attention to certain unique phases of this litigation.

The testimony and proofs, regarding the Grier invention and the Grier machines, were given full credence by the lower Court and, apparently, by this Court.

Such full credence was given to the Grier proofs notwithstanding the same find absolutely no corroboration in the plaintiff's testimony or proofs.

On the other hand, apparently no credence has been given the defendants' proofs regarding the Vernon machine, notwithstanding *all* the facts, relied on as proving the Vernon machine an anticipation, are established by *plaintiff's own proofs and admissions*, as summarized in our reply brief.

Also, on the other hand, apparently no credence has been given the testimony of Campbell, Brunker and Mapes, notwithstanding said testimony is, *in respect to its most vital features*, fully corroborated by the 1910 testimony of the two Dunkleys, quoted to them while on the stand herein, and by the 1910 testimony of the witnesses called on behalf of Dunkley in the Interference Proceeding.

We respectfully submit the foregoing presents a most unique situation, the existence of which is not suggested in the Court's opinion. In view of the foregoing and in view of the Court's failure to refer

to the conflict between the 1910 and the 1916 testimony of the Dunkleys, we are led to believe we have heretofore failed to make clear our various contentions and the facts upon which they are based.

Counsel for defendants-appellants are profoundly convinced that the Court has misapprehended the facts in the case and that a rehearing would work to ends of justice,

WILLIAM K. WHITE,
FREDERICK S. LYON,
KEMPER B. CAMPBELL,
Counsel for Defendants-Appellants.

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded; that the case is one in which the prayer of the petitioners should be granted by this Court, and that the petition is filed in good faith and not for the purpose of delay.

WILLIAM K. WHITE,
Of Counsel for Defendants-Appellants.

United States
Circuit Court of Appeals

For the Ninth Circuit.

CENTRAL CALIFORNIA CANNERIES COMPANY, a
Corporation GRIFFIN & SKELLEY COMPANY,
J. C. AINSLEY PACKING COMPANY, ANDERSON-
BARNGROVER MANUFACTURING COMPANY,
GOLDEN GATE PACKING COMPANY, J. F. PYLE
& SON, INCORPORATED, HUNT BROTHERS COM-
PANY, SUNLIT FRUIT COMPANY, a Corporation,
Appellants,

vs.

DUNKLEY COMPANY, a Corporation,
Appellee.

**NOTICE OF MOTION FOR ORDERS VACATING
DECREE AFFIRMING DECREES OF DISTRICT
COURT, ETC., AND SHOWING IN SUPPORT OF
SAID MOTION.**

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.

FRANCIS J. HENEY,
WILLIAM K. WHITE,
FREDERICK S. LYON,
KEMPER B. CAMPBELL,
Solicitors and Counsel for Defendants-Appellants.

United States
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CENTRAL CALIFORNIA CANNERIES COMPANY, a
Corporation GRIFFIN & SKELLEY COMPANY,
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GOLDEN GATE PACKING COMPANY, J. F. PYLE
& SON, INCORPORATED, HUNT BROTHERS COM-
PANY, SUNLIT FRUIT COMPANY, a Corporation,
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WILLIAM K. WHITE,
FREDERICK S. LYON,
KEMPER B. CAMPBELL,
Solicitors and Counsel for Defendants-Appellants.

INDEX.

	Page
Affidavit of Kemper B. Campbell in Support of Motion for Orders Vacating Decree Af- firming Decrees of District Court, etc.....	10
Affidavit of Kemper B. Campbell in Dunkley Co. v. Pasadena Canning Co.	19
Affidavit of Kemper B. Campbell in Dunkley Co. v. Pasadena Canning Co.	67
Affidavit of S. J. Dunkley in Dunkley Co. v. Pasadena Canning Co.	49
Affidavit of George E. Grier for Use on Behalf of Defendant in Opposition to Plaintiff's Motion to Dismiss in Dunkley Co. v. Pasa- dena Canning Co.	30
Affidavit of John H. Miller in Dunkley Co. v. Pasadena Canning Co.	64
Affidavit of William K. White on Application for Stay of Issuance of Mandate.....	15
Assignment, Michigan Canning & Machinery Co., etc., to Dunkley Co., Dated July 25, 1916	7
Certificate of Clerk U. S. District Court to Cer- tain Papers	70
Discontinuance of Suit Dunkley Co. v. Pasadena Canning Co.	17

EXHIBITS:

Exhibit "A" to Affidavit of Kemper B.
Campbell—Assignment, Michigan Can-

Index.	Page
EXHIBITS—Continued:	
ning & Machinery Co., etc., to Dunkley Co., Dated July 25, 1916.....	7
Exhibit "A" to Affidavit S. J. Dunkley— Articles of Association of Dunkley Co.	51
Exhibit "B" to Affidavit of S. J. Dunkley— Articles of Association of Dunkley Co.	55
Exhibit "C" to Affidavit of S. J. Dunkley— Assignment, Michigan Canning & Ma- chinery Co., to Dunkley Co.	62
Minutes of Court—March 18, 1918—Order Con- tinuing Cause of Dunkley Co. v. Pasadena Canning Co.	18
Minutes of Court—March 25, 1918—Order of Submission of Motion for Continuance, etc., in Dunkley Co. v. Pasadena Canning Co....	43
Notice of Motion to Dismiss Dunkley Co. v. Pasa- dena Canning Co.	44
Notice of Motion for Orders Vacating Decree Affirming Decree of District Court, etc. ..	1
Order Shortening Time	45
Order Staying Issuance of Mandates to and In- cluding May 6, 1918, etc.	72
Petition of Plaintiff for Leave to Dismiss Dunkley Co. v. Pasadena Canning Co.	46

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2915.

CENTRAL CALIFORNIA CANNERIES COM-
PANY,

Appellant,

GRIFFIN & SKELLEY COMPANY,

Appellant,

J. C. AINSLEY PACKING COMPANY,

Appellant,

ANDERSON-BARNGROVER MANUFACTUR-
ING COMPANY,

Appellant,

GOLDEN GATE PACKING COMPANY,

Appellant,

J. F. PYLE & SONS, INC.,

Appellant,

HUNT BROTHERS COMPANY,

Appellant,

SUNLIT FRUIT COMPANY,

Appellant,

vs.

DUNKLEY COMPANY,

Appellee.

Notice of Motion.

To Dunkley Company, Appellee, and Messrs. Fred
L. Chappell and John H. Miller, Its Solicitors
and Counsel:

You are hereby notified that on Monday, May 6,
1918, at the hour of 10:30 A. M., as as soon there-

after as counsel can be heard, in the courtroom of the above-entitled court in the United States Post Office and Courthouse Building, in the City and County of San Francisco, California, the above-named appellants will move the Court for the following orders and decrees, and such further, other and additional relief, as to this Honorable Court may appear proper and just in the light of the showing made, to wit:

1. An order and decree vacating and setting aside the order and decree, made and entered herein by this Honorable Court on October 1, 1917, affirming the interlocutory decree of the District Court for the Southern Division of the Northern District of California, made and entered by it on the 8th day of December, 1916, in each of the above-entitled causes.

2. An order and decree reversing, vacating and setting aside the said interlocutory decree made and entered by said District Court on the 8th day of December, 1916, in each of said causes.

3. An order and decree setting aside the order of submission for decision, which was made and entered by said District Court in each of said causes on the 5th day of April, 1916, and reopening the case for further testimony and proof on behalf of appellant.

4. An order permitting appellants to take the depositions of Messrs. Fred L. Chappell, John H. Miller, Samuel Dunkley, Melville E. Dunkley, William F. Burrows, Henry W. Hardy, Philip Larmmon, Albert Bettcher, Henry Veeder, and any and

all others who may be shown by the answers of any of the foregoing witnesses to have participated in or to have knowledge of the transaction upon which this motion is based.

5. An order and decree dismissing each of said causes and directing the District Court to make and enter, in each of said causes, a final decree dismissing the bill of complaint therein with costs to the defendant therein.

6. An order that the appellants recover against the appellee for their costs herein expended.

GROUNDS OF MOTION.

Said motion will be based upon the following grounds, to wit:

1. That prior to March 28, 1916, and prior to the commencement of the trial of this cause in said District Court and prior to the decision therein, the plaintiff-appellee sold, assigned and transferred to another corporation all the right, title and interest in and to the United States letters patent No. 1,104,175, being the letters patent sued on herein, together with all its right, title and interest in and to any and all causes of action arising out of, connected with or incident to the ownership of said letters patent No. 1,104,175, which had accrued or arisen prior to such sale, assignment and transfer, and particularly the causes of action sued on herein.

2. That prior to the decision of the District Court herein and prior to the making and entry of the respective interlocutory decrees in said causes by said District Court, the plaintiff-appellee did execute a certain written instrument which bears the

date July 25, 1916, evidencing the sale, assignment and transfer to another corporation of all the right, title and interest in and to United States letters patent No. 1,104,175, being the letters patent sued on herein, and thereafter, to wit, on September 21, 1916, said written instrument was duly filed and recorded in the United States Patent Office at Washington, D. C., at the request of the attorneys for said other corporation assignee.

3. That by reason of the foregoing facts, each of said causes abated at the time of such sale, assignment and transfer and all proceedings had and taken therein subsequent to such sale, assignment and transfer are nugatory.

4. That the defendants-appellants had no knowledge of the aforesaid sale, assignment and transfer by the plaintiff-appellee of the right, title and interest in and to the United States letters patent No. 1,104,175, being the letters patent sued on herein, or of its sale, assignment and transfer of its right, title and interest in and to said, or any of said causes of action herein, at any time prior to the 11th day of April, 1918, when it learned thereof for the first time by having its attention brought to a motion to dismiss which was filed by said plaintiff in another suit then pending between it and another defendant in the United States District Court, Southern District of California, Southern Division, said suit being entitled "Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant, No. C-8—In Equity," the affidavits and other papers filed by said plaintiff on said motion are

attached to the affidavit of William K. White heretofore filed herein with the clerk of this court in support of appellants' application for a stay of the issuance of the mandates herein.

5. That by reason of its concealment of the foregoing facts from said District Court and from this court and of other vexatious and inequitable conduct on its part, as appears from the records of said District Court and of this court, said plaintiff is not entitled to any relief in a court of equity and therefore the bill of complaint in each of said causes should be dismissed with costs to the defendant therein.

6. That since the 1st day of January, 1918, the defendants-appellants have acquired knowledge of newly discovered evidence from the defendant in the aforesaid case, pending in said District Court for the Southern District of California, which conclusively proves, as defendants are advised by their attorneys, that the testimony of Samuel J. Dunkley, Melville E. Dunkley and H. C. Schau, which was given in the trial of this cause, is not true in substance or effect in relation to the respective dates and times at which the invention covered by said letters patent No. 1,104,175, being the patent sued on herein, was conceived and was embodied in a machine and that such dates and times have been antedated more than one year respectively by such testimony and that the true dates of said conception and of such embodiment in a machine respectively are subsequent to August 3, 1903, the date prior to which the Grier anticipating machines were com-

pleted and put into public and commercial use.

At the hearing of said motion, appellants will rely on and use all the records, pleadings and papers herein; the briefs on file herein; the certified copy of the papers and proceedings filed and taken by the plaintiff-appellee in that certain suit now pending and heretofore brought by the plaintiff-appellee in the United States District Court for the Southern District of California and entitled "Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant, No. C-8—In Equity," and which certified copy is attached to the affidavit of William K. White heretofore filed herein with the clerk of this court in support of appellee's application for a stay of the issuance of the mandates herein; a certified copy of the assignment of said letters patent in suit to such other corporation and which certified copy is filed herewith and marked Exhibit "A"; and the affidavit of Kemper B. Campbell attached hereto and served herewith.

FRANCIS J. HENEY,
WILLIAM K. WHITE,
FREDERICK S. LYON,
KEMPER B. CAMPBELL,
Solititors and Counsel for Appellants.

**Exhibit "A" to Affidavit of Kemper B. Campbell—
Assignment, Michigan Canning & Machinery
Co., etc., to Dunkley Co., Dated July 25, 1916.**

2-391

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come,
GREETING:

THIS IS TO CERTIFY that the annexed is a true
copy from the records of this office of an instrument
of writing

Recorded September 21, 1916,
in

Liber Q-101, page 59.

Said record has been carefully compared with
the original and is a correct transcript of the whole
thereof.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and caused the seal of the Patent Office
to be affixed at the City of Washington, this 18th
day of April, in the year of our Lord one thousand
nine hundred and eighteen and of the Independence
of the United States of America the one hundred
and forty-second.

[Seal]

F. W. H. CLAY,
Acting Commissioner of Patents.

Exhibit "A" to Affidavit of Kemper B. Campbell.
J. H. Ardis, Notary Public.

WHEREAS, MICHIGAN CANNING COMPANY (former name Dunkley Company), of Kalamazoo, Michigan, a corporation duly incorporated and existing under the laws of Michigan, did obtain letters patent of the United States for an improvement in Machines for Peeling Peaches and other Fruit, which letters patent are numbered 1,104,175 and bear date the 21st day of July, 1914; and

WHEREAS, said Michigan Canning & Machinery Company is now the sole owner of said patent and of all rights under the same; and

WHEREAS, the Dunkley Company, a corporation duly incorporated and existing under the laws of the State of Michigan, is desirous of acquiring the entire interest in the same;

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN, be it known that, for and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations to it in hand paid, the receipt of which is hereby acknowledged, the said Michigan Canning & Machinery Company has sold, assigned and transferred and by these presents does sell, assign and transfer unto the said Dunkley Company, the whole right, title and interest in and to the said improvement in Machines for Peeling Peaches and other Fruit, and in and to the letters patent therefor aforesaid; the same to be held and enjoyed by the said Dunkley Company for its own use and behoof and for the use and behoof of its legal successors and assigns to the full end of the term for which said letters patent are or may be

granted, as fully and entirely as the same would have been held and enjoyed by it had this assignment and sale not been made.

IN WITNESS WHEREOF, the Michigan Canning & Machinery Company has caused this instrument to be executed in its corporate name and in its behalf by its President and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its Secretary, this 25th day of July, 1916.

MICHIGAN CANNING & MACHINERY
COMPANY,

By PHILIP LARMON,

President.

Attest: SAMUEL J. DUNKLEY, Secretary.

[Michigan Canning & Machinery Company Corporate Seal Michigan]

State of Illinois,
County of Cook,—ss.

I, Albert Bettcher, a Notary Public in and for said County in the State aforesaid, do hereby certify that Philip Larmon, President of the Michigan Canning & Machinery Company, personally known to me to be the same person whose name is subscribed to the foregoing instrument as such President and to be such President, appeared before me this day in person and acknowledged that he signed and delivered and said instrument as the free and voluntary act of said Michigan Canning & Machinery Company and as his own free and voluntary act as such President, for the uses and purposes therein set forth.

GIVEN under my hand and official seal this 25th day of July, 1916.

ALBERT BETTCHER,

Notary Public, Cook County, Illinois.

[Albert Bettcher, Notary Public, Cook County, Ill.]

MW/V.

Recorded September 21, 1916.

Affidavit of Kemper B. Campbell.

State of California,

County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn, on oath says that he is one of the attorneys for the defendant in that suit in equity in the United States District Court, Southern District of California, Southern Division, entitled Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant, No. C-8—In Equity, referred to in the foregoing motion, and as such had direct charge of investigating the testimony given by Samuel J. Dunkley, Melville E. Dunkley and Harvey Schau in the cases in which this motion is made.

That in said suit in Equity C-8 aforesaid, one of the defenses relied upon is that the Dunkley patent is void because the invention of George E. Grier antedated the alleged invention of Dunkley and the use of machines manufactured by said Grier anticipated the invention of said Dunkley.

That in the trial of the suits in which the attached motion is made, evidence was introduced in said suits tending to show that Grier conceived his in-

vention in August, 1902, and disclosed it at that time and it was established by documentary proof and practically conceded by the plaintiff and found by the Court that Grier began the construction of two large commercial machines in April, 1903, and completed them and put them in commercial operation in July and August of that year. That in order to meet the proofs so made, witnesses S. J. Dunkley, Melville E. Dunkley, his son, and Harvey Schau, their employee, took the stand and testified that a model machine was made in 1902 and that peaches were peeled by it at that time; that during the peach season of 1903 a commercial machine was made, which was operated extensively; notwithstanding the fact that during the interference proceedings in the Patent Office said S. J. Dunkley and Melville E. Dunkley had testified that the first or model machine was made in the summer of 1903.

That affiant is informed and believes and therefore states that the testimony of said S. J. Dunkley, Melville E. Dunkley and Harvey Schau to the effect that said experimental model machine was made and operated in the year 1902 and that a commercial machine was made and operated in 1903 was wholly and wilfully false and untrue, and given for the purpose of committing a fraud upon the Court and the people of the United States and of acquiring for this plaintiff rights to which it was not entitled.

That affiant on or about March 23, 1918, returned from a careful investigation covering a period of six weeks' duration, in which he has personally

12 *Central California Canneries Company et al.*

interviewed a large number of men and women who were employed by said S. J. Dunkley, the alleged inventor, during the years 1902, 1903 and 1904. That some of those interviewed informed affiant that they were present when the original model machine was constructed during the fall of 1903 and subsequent to July of that year and not in 1902 as testified to by the two Dunkleys and Schau, and that said model was first tried out late in October, 1903, and that the first commercial machine was made during the spring of 1904 and first tried out and used during the late summer and fall of 1904. That a large number, to wit, in excess of fifty of said persons employed by said S. J. Dunkley during the years 1903 and 1904 informed affiant that no lye peeling machine of any kind was used commercially by said S. J. Dunkley or by Dunkley Company in the year 1903 and that the first commercial machine was installed and used at South Haven by said S. J. Dunkley, president of the Dunkley Company, 1904, but on the contrary that during the season of 1903 all peaches packed at said South Haven factory were peeled by the use of knives. That affiant procured, during his investigation, numerous photographs of the interior of said factory and numerous documents which in affiant's opinion conclusively establish the falsity of the testimony referred to and given in behalf of plaintiff in this action in the other suits. Affiant further states that of the large number of persons interviewed by him, there was not a single one who stated the facts to be

as said Dunkleys testified in said cases in which this motion is made.

Affiant further says that he is informed and verily believes the facts to be that the Dunkley Company, plaintiff in the cases in which this motion is made, did assign said letters patent in suit to another corporation, together with all rights and claims arising out of past infringement and particularly the *the* causes of action sued on in the cases in which this motion is made, on or about January 12, 1916, and that the records of the plaintiff corporation and of such other corporation will show these facts, and that the witnesses named in the foregoing motion can and will give material testimony to establish this fact and *and* prove that plaintiff in the cases in which this motion is made, had no right, title or interest in or to the letters patent in suit or in or to the causes of action sued on in said cases or in or to any right of action arising out of or accruing from any infringement of said patent, but, on the contrary, entirely parted with and sold all such right, title and interest on or about January 12, 1916.

Affiant further says that counsel for appellants in said cases had no knowledge or information or notice of any such transfer or assignment by plaintiff of any right, title or interest in the patent in suit until on April 11th, 1918, a supplemental motion to dismiss was filed in the United States District Court at Los Angeles, California, in said suit No. C-8 in Equity.

KEMPER B. CAMPBELL.

14 *Central California Canneries Company et al.*

Subscribed and sworn to before me this 30th day of April, 1918.

[Seal]

J. H. ANDIS,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. No. 2915. United States Circuit Court of Appeals for the Ninth Circuit. Central California Canneries Company et al., Appellants, vs. Dunkley Company, Appellee. Notice of Motion. Filed May 1, 1918. F. D. Monckton, Clerk.

Received a copy of the within this 30th day of April, 1918.

FRED L. CHAPPELL,
Solicitors for Plaintiff Appellee.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2915.

CENTRAL CALIFORNIA CANNERIES COM-
PANY,

Appellant,

GRIFFIN & SKELLEY COMPANY,

Appellant,

J. C. AINSLEY PACKING COMPANY,

Appellant,

ANDERSON-BARNGROVER MANUFACTUR-
ING COMPANY,

Appellant,

GOLDEN GATE PACKING COMPANY,
Appellant,
J. F. PYLE & SONS, INC.,
Appellant,
HUNT BROTHERS COMPANY,
Appellant,
SUNLIT FRUIT COMPANY,
Appellant,
vs.
DUNKLEY COMPANY,
Appellee.

Affidavit of W. K. White.

State of California,
City and County of San Francisco,—ss.

William K. White, being first duly sworn, says: I am one of the attorneys for the above-named appellants; that prior to May 6, 1918, and noticed for hearing on that day, appellants will file herein a motion for an order and decree vacating and setting aside this Court's decrees affirming the interlocutory decrees of the District Court herein, and also a motion for other and such further relief as to the Court may seem proper and just in the premises:

Said motion will be based, in part, upon the ground that, on July 25, 1916, prior to the decision of the District Court herein, and prior to the making and entry herein by the District Court of said interlocutory decrees, the plaintiff-appellee sold and assigned to another corporation all the right, title and interest in and to the Dunkley patent sued on herein, as ap-

pears from the certified copy of the papers and proceedings filed and taken by the plaintiff-appellee in that certain suit now pending and heretofore brought by the plaintiff-appellee in the United States District Court, for the Southern District of California, and entitled "Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant, No. C-8";

Said certified copy of said papers and proceedings is hereto attached and made a part hereof.

WHEREFORE, affiant respectfully prays for an order staying the issuance of the mandates herein to and including May 6, 1918 and, upon the filing of said motion herein prior to said date, staying the issuance of the mandates until said motion is heard and determined by this Honorable Court.

WILLIAM K. WHITE.

Subscribed and sworn to before me this 19th day of April, 1918.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San
Francisco, State of California.

In the Southern Division of the United States District Court for the Southern District of California, Southern Division.

No. C-8.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Discontinuance of Suit.

Now comes plaintiff in the above-entitled suit, by John H. Miller, Esq., its attorney, and discontinues and dismisses the said suit with costs to be awarded to the defendant, but without prejudice to the right of the plaintiff to commence a new suit for the same cause of action.

Dated: March 15, 1918.

JOHN H. MILLER,
Attorney for Plaintiff.

[Endorsed]: No. C-8. United States District Court, Southern District of California, Southern Division. Dunkley Company vs. Pasadena Canning Co. Discontinuance of Suit. Filed Mar. 18, 1918. Chas. N. Williams, Clerk. By Geo. W. Fenimore, Deputy Clerk. John H. Miller, Attorney at Law, 723-4-5-6, Crocker Building, San Francisco, Cal., for Plaintiff.

At a stated term, to wit, the January term, A. D. 1918, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the eighteenth day of March, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. C-8—Eq.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Minutes of Court—March 18, 1918—Order Continuing Cause of Dunkley Co. v. Pasadena Canning Co.

This cause coming on this day for the hearing of defendant's motion to file an amended answer herein; Frederick S. Lyon, Esq., appearing as counsel for the defendant; and counsel appearing for Fred L. Chappell, Esq., of counsel for plaintiff, having moved the Court to dismiss this cause without prejudice and with costs; good cause appearing, IT IS ORDERED that this cause be and the same hereby is continued one (1) week, to wit, until Monday, the 25th day of March, 1918, for further argument herein.

*United States District Court, Southern District of
California, Southern Division.*

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Affidavit of Kemper B. Campbell.

State of California,

County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn, deposes and says: That he is one of the attorneys for defendant in the above-entitled action. That this is an action for an alleged infringement by defendant of a certain patent for a machine for peeling peaches and other fruit, a typical claim in said patent being as follows:

“In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing a peeling water jet upon said fruit as it advances.”

That during the year 1915 and each season since defendant has used a machine constructed in substantial accordance with U. S. patent 1,168,799 granted to George E. Grier, and had in 1914 discontinued the use of the first type of Grier machine to which patent affiant refers and hereby makes a part of this affidavit. That affiant is informed and

believes and therefore states that the first of said machines used by defendant was invented by G. E. Grier, president and manager of defendant, in the month of August, 1902. That the actual construction of said machine began in the month of April, 1903, and its commercial use commenced in July, 1903, and continued during many successive years thereafter. That said machine consisted of a shaker device for advancing and turning the fruit and nozzles so arranged as to direct sprays or jets of water upon the fruit as it advanced. That said machine comes directly within the terms of the claim quoted and other claims of plaintiff's alleged patent and therefore would anticipate the Dunkley invention if prior in time or would infringe if subsequent, and therefore one of the main questions to be decided in this suit is, who was the first inventor, Grier or Dunkley? That the Dunkley patent was applied for on November 29th, 1904, and issued on July 21st, 1914; that in certain suits brought by plaintiff herein in the District Court of the United States in and for the Northern District of California, Second Division, to wit, Number 201, entitled Dunkley Company vs. Central California Canneries Company, and certain other suits consolidated and heard upon the same testimony, interlocutory decrees were entered against said defendants and affirmed upon appeal by the Circuit Court of Appeals.

That one of the defenses relied upon in said suits and in the case at bar is that the Dunkley patent is void because said first machine, invented and built by G. E. Grier of the Pasadena Canning Company,

the copartnership predecessor in interest of the defendant corporation, antedated the alleged invention of Dunkley. That evidence was introduced in said suits tending to show that Grier conceived his invention in August, 1902, and disclosed it at that time and it was established by documentary proof and practically conceded by the plaintiff and found by the Court that Grier began the construction of two large commercial machines in April, 1903, and completed them and put them in commercial operation in July and August of that year. That in order to meet the proofs so made, witnesses S. J. Dunkley, Melville E. Dunkley, his son, and Harvey Schau, their employee, took the stand and testified that a model machine was made in 1902 and that peaches were peeled by it at that time; that during the peach season of 1903 a commercial machine was made, which was operated extensively; notwithstanding the fact that during the interference proceedings in the Patent Office said S. J. Dunkley and Melville E. Dunkley had testified that the first or model machine was made in the summer of 1903.

That affiant is informed and believes and therefore states that the testimony of said S. J. Dunkley, Melville E. Dunkley and Harvey Schau to the effect that said experimental model machine was made and operated in the year 1902 and that a commercial machine was made and operated in 1903 was wholly and wilfully false and untrue, and given for the purpose of committing a fraud upon the court and the people of the United States and of acquiring for this plaintiff rights to which it was not entitled.

That affiant has just returned from a careful investigation covering a period of six weeks' duration, in which he has personally interviewed a large number of men and women who were employed by said S. J. Dunkley, the alleged inventor, during the years 1902, 1903 and 1904. That some of those interviewed informed affiant that they were present when the original model machine was being constructed and that said experimental model machine was constructed during the fall of 1903 and subsequent to July of that year and not in 1902 as testified to by the two Dunkleys and Schau, and that said model was first tried out late in October, 1903, and that the first commercial machine was made during the spring of 1904 and first tried out and used during the late summer and fall of 1904. That a large number, to wit, in excess of fifty of said persons employed by said S. J. Dunkley during the years 1903 and 1904 informed affiant that no lye peeling machine of any kind was used commercially by said S. J. Dunkley or by Dunkley Company in the year 1903 and that the first commercial machine was installed and used at South Haven by said S. J. Dunkley, president of the Dunkley Company, in 1904, but on the contrary that during the season of 1903 all peaches packed at said South Haven factory were peeled by the use of knives. That affiant procured, during his investigation, numerous photographs of the interior of said factory and numerous documents which in affiant's opinion conclusively establish the falsity of the testimony referred to and given in behalf of plaintiff in this action in the other suits.

Affiant further states that of the large number of persons interviewed by him, there was not a single one who stated the facts to be as said Dunkleys testified in the case recently tried in the Northern District of California. That more than thirty of said witnesses, including those employed during the years referred to in and about said factory and having knowledge of all methods of peeling peaches therein during the years of 1902, 1903 and 1904, have agreed to come to California to testify in this suit and affiant is informed and believes and therefore states that some of them have already rearranged their business and personal affairs to do so.

That on or about the 24th day of March, 1916, an attempt was made by plaintiff to take the deposition of one Carr, Secretary of the California Fruit Canners Association, and one R. I. Bentley, manager of said corporation. That upon advice of counsel for plaintiff herein, said witnesses and each of them refused to answer certain questions propounded and were cited before Honorable William C. Van Fleet, District Judge; that counsel for plaintiff vigorously resisted the taking of said depositions and in the course of his opposition insisted to the court that said witnesses would be produced to testify in the trial of this case in open court, and in connection with said argument stated to the court and to counsel for defendant as follows, as shown on page 30 of the record of that case:

“Mr. CHAPPELLE.—The recognizance for the witnesses to appear at Pasadena if there is anything of that kind that will satisfy the re-

quirements of the gentleman, we are willing to furnish that, because we wish the case tried in open court.

“The COURT.—Of course, the assurance of counsel on either side of this case would be sufficient recognizance for me, so far as that is concerned. I do not think that either counsel would represent that certain things would be so unless they were intending to carry it out.”

That apparently, in pursuance of said design to try this case in open court, plaintiff has taken no depositions of any witnesses and defendant, relying upon said statement so made by Mr. Chappelle in open court, and realizing the disadvantage to which defendant would be put by submitting its testimony by deposition when plaintiff intended to and insisted upon the production of its witnesses in open court, has been forced to likewise prepare for the production of witnesses to be examined *ore tenus*.

That this case has been pending since the 22d day of December, 1915. That no effort was made to have said case set for trial until on or about the 14th day of November, 1917, on which date one of the attorneys for defendant received from Mr. John H. Miller, attorney for plaintiff, a letter referring to the setting of this case for trial, as follows:

“Our people are anxious to dispose of this case, and would like to have an early trial of the same if you are still disposed to push the defense further. I wish you would let me know what is the earliest day the case can be set for

trial and about what date would suit your convenience."

That upon the call of the calendar on the 11th day of January, 1918, counsel for plaintiff in open court requested and urged an early date of trial, then and there for the first time asserting that the issues between the parties had practically been determined in the suits previously tried in the Northern District. That defendant was informed of said insistence of plaintiff to try this case in open court and was informed of the contents of the letter referred to, and was informed of the representations made by counsel in open court and insistence upon an early trial and immediately upon the setting of the said case instructed affiant to procure and engage such additional counsel as he deemed advisable; that he go to the State of Michigan, taking with him or procuring while there such assistants as were found necessary and thoroughly investigate the truth or falsity of the claims made by plaintiff as based upon the story of the alleged invention of S. J. Dunkley as related in said suits in the Northern District of California. That acting under said instructions affiant engaged additional counsel and obligated the defendant herein for counsel fees in an amount exceeding Fifteen Thousand Dollars. That early in the month of February, 1918, in pursuance of said instructions of G. F. Grier, president of defendant corporation, affiant retained and employed Francis J. Heney, Esquire, now attorney for the Federal Trade Commission of the United States, to conduct the trial of this action. That when said

Francis J. Heney accepted said employment as counsel for defendant, he informed affiant that his present employment would in all probability terminate on or before the first day of April, 1918. That subsequently said Francis J. Heney informed affiant that said Federal Trade Commission desired said Heney to continue his present work for a period subsequent to said first day of April. That affiant, representing defendant, insisted to said Francis J. Heney that he sever his connection, if possible, with the Federal Trade Commission for the time being for the reason that affiant had depended upon the assistance of said Heney and it was then too late to engage other counsel. Affiant is informed and believes that said representations made by affiant were, on or about the — day of March, 1918, conveyed to the Federal Trade Commission of the United States and it was then arranged that said Francis J. Heney should be released from his present employment for the purposes of the trial of this case.

That in the investigation of the facts of the alleged Dunkley patent, it was found that witnesses had scattered to various parts of the United States and it was necessary to and affiant did hire, to conduct said investigation, a number of assistants who were compelled to travel, in the aggregate, many thousands of miles, costing the defendant a sum in excess of Four Thousand Dollars. That having interviewed these witnesses it is affiant's opinion that many of them, having made arrangements with their present employers and others to be absent in Cali-

fornia for the purpose of this suit, it will be impossible to obtain the testimony of these persons as voluntary witnesses in subsequent litigation.

Affiant further states that several of said witnesses are aged and infirm, particularly, to wit, C. D. Crary of Maywood, Illinois, and Mrs. Hattie Avery of South Haven, Michigan. That in the event of the dismissal or postponement of this cause the testimony of said witnesses will be lost to the defendant; that the testimony to be given by said witnesses is material to the issues in this case; that affiant is informed and believes and therefore states that said C. D. Crary would testify that he was machinery superintendent for said S. J. Dunkley at the factory in South Haven during the year 1902, and that no experimental model peach-peeling machine was made in said factory during that year, and that on the contrary said experimental model peach-peeling machine was made in said factory in the late fall of 1903.

That affiant is informed and believes and on that ground alleges, that Friday Brothers, a copartnership doing business at Coloma, Michigan, by reason of repeated threats of suit made to them by plaintiff, and in order to prevent the annoyance and expense of litigation but without conceding the right of plaintiff in the premises, has been compelled to pay plaintiff royalties in substantial sums for the use of a machine manufactured under defendant's Grier patent No. 1,168,799, and furnished to said Friday Brothers by Anderson-Barngrover Manufacturing Company of California, plaintiff has here-

tofore established the validity of its alleged patent in said litigation in the Northern District of California.

That said machine now in use by defendant and in exclusive use by it since a time prior to the institution of this suit, does not infringe plaintiff's patent and was in no way involved in the suits in the Northern District of California hereinbefore referred to; a copy of the record on appeal of said cases of Central California Canneries Company, a corporation, et al., Appellants, vs. Dunkley Company, a Corporation, Appellee, No. 2915, United States Circuit Court of Appeals for the Ninth Circuit, is hereby made a part of this affidavit for the purpose of this motion.

That witness Carr, whose deposition was attempted to be taken and whose presence at the trial of this cause was promised and guaranteed by plaintiff, has since died and his testimony, material to the issues herein, has been lost to the defendant.

That this suit is of wide and general public interest, for the reason that if plaintiff prevails in this action, and succeeds in forcing its claim of a tribute from the fruit packers of the United States of from three to six dollars per ton of peaches canned, that it will not only result in a monopoly of the peach canning industry but will confer upon plaintiff and the interests behind it, a leverage to effect a monopoly of all other fruits as well. That this case is of vital public interest and therefore should not be dismissed for the reason that it should be promptly determined whether or not such tribute can be exacted, based

upon a patent sustained by false testimony as herein set forth.

That affiant was called back to Los Angeles by a telegram received at Chicago on Tuesday, March 19, 1918, stating that plaintiff had without any notice whatever to defendant herein, made an *ex parte* motion to dismiss this suit without prejudice to its right to bring a new action. That affiant arrived in Los Angeles late on Saturday, March 23, 1918; that he has diligently and at first opportunity prepared for service and filing this and other affidavits to be used upon this motion.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 25th day of March, 1918.

[Seal]

C. L. BAGLEY,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. C-8—Eq. United States District Court, Southern District of California, Southern Division. Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant. Affidavit of Kemper B. Campbell. Filed Mar. 25, 1918. Chas. N. Williams, Clerk. T. F. Green, Deputy. Kemper B. Campbell, Attorney at Law, 810-821 California Building, cor. 2d and Broadway. Phones: Home 60429, Main 2136, Los Angeles, Cal.

In the United States District Court, Southern District of California, Southern Division.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

**Affidavit of George E. Grier for Use on Behalf of
Defendant in Opposition to Plaintiff's Motion
to Dismiss.**

State of California,

County of Los Angeles,—ss.

George E. Grier, being first duly sworn, deposes and says:

I am president of the defendant, Pasadena Canning Company, which was incorporated in 1905; and own all of the capital stock thereof, except three shares respectively owned by three others to qualify them to act as directors of said corporation.

In 1902, I and one E. A. Taylor formed a partnership, under the firm name of Pasadena Canning Company, and leased a building in Pasadena, California, wherein, for many years thereafter, said firm conducted a fruit canning business; during the same period, Mr. Taylor was operating the East Side Canning Company, in Los Angeles.

During the peach season of 1902, I conceived a peach-peeling machine and disclosed to others its construction and mode of operation; in April, 1903, I employed one W. H. Finley to build two peach-

peeling machines embodying my invention; these two machines were completed in July, 1903, and one of them, during that month, was commercially, successfully and publicly used in the peeling of peaches at the plant of said Pasadena Canning Company and the use thereof by said firm was continued through the 1903 peach season and for many subsequent seasons thereafter, including the 1914 peach season; the other machine, so completed in July, 1903, was delivered to the East Side Canning Company and its public and commercial use, in the plant of that company in Los Angeles, was commenced at least as early as August 3, 1903.

A photograph disclosing said East Side Canning Company machine is attached hereto and made a part hereof. It has been admitted by plaintiff that each of said machines, which were identical in construction, embodied each and all the respective combinations of elements, and the inventions, respectively covered by all the Dunkley patent claims in issue in this litigation.

At the trial of those certain suits, now pending in the United States District Court for the Southern Division of the Northern District of California, and brought by the plaintiff, Dunkley Company against Central California Canneries Company, Griffin & Skelley Company; J. C. Ainsley Packing Company; Anderson Barngrover Manufacturing Company; Golden Gate Packing Company; J. F. Pyle & Son, Inc.; Hunt Brothers Company; and Sunlit Fruit Company; a large number of witnesses testified regarding my conception, disclosure to others and

reduction to practice of my said invention, embodied in each of said two machines, and the proofs of said facts were so voluminous, elaborate and convincing that the Court stopped the introduction of further proof; furthermore, the opinion of the Court, rendered in said cases, gives full credence to said testimony and proofs, which, I understand, pursuant to the stipulation of the parties in this case, will be filed herein at the hearing of this cause.

On November 23d, 1914, I filed in the United States Patent Office, an application for letters patent on a substantially different type of fruit washer in which no "peeling jets" of water were employed; letters patent No. 1,168,799 were, on January 18, 1916, issued to me upon said application.

In the spring of 1915, at the plant of the defendant, Pasadena Canning Company, the corporation successor in interest of the copartnership firm doing business under the name of Pasadena Canning Company, there was a complete, full-sized commercial machine substantially identical with the machine disclosed in the drawings and described in the specification of my said patent No. 1,168,799.

Some time during the said spring of 1915, Mr. S. J. Dunkley, who, I understood to be and therefore, upon information and belief, state was, at that time the president and representative of the plaintiff, Dunkley Company, telephoned me, at the plant of the defendant, that he was coming out to see me; shortly thereafter, he arrived at the defendants' plant, in Pasadena; while he was at the plant, and

in the presence of two employees of defendant, I exhibited to him said machine, like that disclosed on my patent; I showed all parts of the machine and, in order that he might thoroughly understand its construction and operation, I took some canned whole peaches and, after placing some dust and dirt on them to represent skin, they being peeled peaches, I put them in the machine and operated it to illustrate how the dust and dirt, representing the skin, was removed.

Having theretofore been notified by plaintiff that the machine, built by me in 1903, infringed the Dunkley patent in suit, I immediately after so exhibiting my machine to him on the occasion of his said visit in 1915 and during said visit asked Mr. Dunkley if such machine infringed the said Dunkley patent, and he replied that it did not; however, he said his machine was much superior and that it would pay me to discard my own machine, use his and pay his company the royalty charged by it.

Relying on the said representations of Mr. Dunkley and believing plaintiff would never claim said machine to be an infringement of the Dunkley patent in suit, the defendant, Pasadena Canning Company used said machine throughout the peach season of 1915 and has continued to use said machine during every peach season since said date.

I wish to state further, that the said statement of Mr. Dunkley, regarding my said machine not being an infringement of the Dunkley patent, confirmed a less specific statement made the previous fall by Mr. John H. Miller, one of the plaintiff's attorneys.

At a meeting, in the rooms of the California Cannery League in San Francisco, during the fall of 1914 Mr. Miller was asked if a peach-peeling machine, not employing *jets of water*, but only a body of water to remove the disintegrated skin, would infringe the Dunkley patent in suit; he replied he had not examined the Dunkley patent very carefully and, therefore, could not answer positively, but that he thought such a machine would not infringe; as stated before, the machine disclosed in my patent and so exhibited to Mr. Dunkley in the spring of 1915 and which he said did not infringe the Dunkley patent, *does not employ or make use of any peeling jets of water*, as specifically called for by the claims of the Dunkley patent in suit.

In further reliance upon the said representations of Mr. Dunkley as plaintiffs, agent, an exclusive license was issued to the Anderson-Barngrover Manufacturing Company of San Jose, whereby that company, for the life of my patent, was authorized to manufacture and sell machines embodying the invention so disclosed in my patent; under the terms of said license, said company is required to pay a royalty for each machine sold by it and embodying my patented invention; operating under such license, the Anderson-Barngrover Company has made and sold, to various fruit canneries, many of said machines and, defendant has received the said royalties thereon.

That notwithstanding the said representations made by plaintiffs' agent, Mr. S. J. Dunkley, plaintiff thereafter charged my said patented machine to

be an infringement of the Dunkley patent sued on herein and notices to such effect have been given to numerous parties using the same.

I am informed and believe, and upon such information and belief state, that plaintiff, in view of said representations of its agent and officer, S. J. Dunkley, is estopped from contending or maintaining in this suit, that my said machine infringes the patent in suit; upon information and belief, I further state that, in the event of this suit being dismissed, and said Dunkley patent being assigned to a third party, defendant, in any suit brought against it by such third party for the infringement of said patent, cannot rely on or successfully maintain said estoppel by way of defense; I, therefore, respectfully submit it would be most inequitable to dismiss this suit and, thereby, possibly deprive defendant of the benefits of a defense it now has.

As stated before, the Anderson-Barngrover Company has an exclusive license to manufacture my said patented machines and the defendant herein thereby derives an income, which would be much larger, if plaintiff were not generally charging said machines to be an infringement; that, in said suit of plaintiff against the Anderson-Barngrover Company, an interlocutory decree has been entered adjudging the Dunkley patent valid; the said Anderson-Barngrover Company is, therefore, in any future proceeding instituted against it by plaintiff to have my said patented machine adjudged an infringement, precluded from relying on the defense of invalidity of the Dunkley patent; however, if this suit be not dis-

missed, defendant may be able, and I feel certain will be able, to prove said patent invalid; wherefore, I understand, said Anderson-Barngrover Company, as defendant's agent, can continue to manufacture said machines, without regard to any injunction issued in the suit of plaintiff against it; and, thereby, defendant will be enabled to continue receiving royalties for such manufacture; I, therefore, respectfully submit it would be most inequitable to dismiss this suit and thus prevent defendant establishing its right to make, use and sell my said patented machines and to license others so to do.

Furthermore, the charges of infringement being made by plaintiff against users of peach-peeling machines, operate as a "*cloud*" on the rights of defendant and those engaged in the fruit canning business throughout the country.

Plaintiff contends that *15¢ per bushel is saved* by the use of the invention monopolized by the Dunkley patent in suit "*over and above the old methods and machines open to the public.*" On information and belief, I state, that plaintiffs' attorney, J. H. Miller, in an affidavit filed by him in one of these *Dunkley* said: "On the accounting the appellee will claim the amount of said savings as the profits to be accounted for by the appellants in addition to what damages the appellee may be able to show. At 50 pounds to the bushel, said claim of savings, or *measure of damages*, amounts to \$6.00 per ton. I am informed and believe, and therefore say, that the California, 1916, pack of canned peaches amounted to more than 90,000 tons. As machines, employing the lye process

and involving the use of water to remove the disintegrated skins, have been generally used in California, as well as elsewhere, throughout the country, plaintiffs' claims and demands against California canners alone, *for only one year's pack, may amount to \$540,000.00.*

In view of the said contentions of plaintiff, it is apparent that the total claims of the plaintiff, against alleged infringers, for the remaining years of the Dunkley patent, amount to millions of dollars.

If the Dunkley patent is not invalidated and plaintiff's said contentions are sustained, such tribute of millions of dollars must be ultimately borne by the consumers of fruit, as the same enters into the cost of producing canned fruit.

The threats of plaintiff to demand and collect of all canners such immense annual tribute operate as a cloud, not only on the defendants' business operations and right to use my said patented machine, but also on the whole fruit canning industry of the United States, as neither defendant nor any other fruit canner, having knowledge of plaintiffs' demands and threats of litigation, can possibly feel safe in continuing its business without taking into account the possible tribute it may be hereafter compelled to pay to plaintiff.

It is therefore apparent that it is vitally necessary for defendant and for the whole fruit canning industry of the country to know, at the earliest possible moment, whether or not, there shall and must be included, in the cost of producing canned fruit, the said immense tribute demanded by plaintiff for the use of

a machine involving the use of lye or similar solution for distintegrating the skin of the fruit and the subsequent use of water to wash off the distintegrated skin.

The early trial of this case and the speedy determination of the validity of the Dunkley patent in suit, *in the light of the further, additional and overwhelming mass of proofs of its invalidity which defendant guarantees to produce at the trial*, are matters of vast importance, not only to defendant, but to the whole nation, which is already too overburdened with the high cost of food to patiently pay tribute to the owner of a patent which, I believe, defendants' proofs will demonstrate was secured and sustained as valid on false testimony.

On information and belief, I state that said plaintiff, by dismissing this suit, hopes to prevent any final or immediate determination of the validity of the Dunkley patent, *in the light of the mass of new evidence defendant has secured and which plaintiffs' representatives know defendant has secured*, and thereby enable plaintiff, through threats, intimidation, and coercion, to effectuate compromises with the various individual canners, thus gradually weakening the opposition to plaintiffs' claims and, at the same time, making it more and more difficult to prove the invalidity of the Dunkley patent.

Said patent was applied for on November 29, 1904; it is therefore, necessary for the defendant, in attacking the validity thereof, to rely on testimony and proofs as to what occurred prior to such date, more than thirteen years ago; that, with the passage of each day, it necessarily becomes more and more diffi-

cult to establish, by oral testimony, what occurred so many years ago in South Haven and Kalamazoo, Michigan, where the Dunkley Company built its first two peach-peeling machines embodying the invention disclosed in the Dunkley patent; with the passage of each day, defendant is confronted with the ever increasing liability and chance of losing, through death or otherwise, the witnesses upon whom it relies to prove what transpired in the Dunkley Company's Michigan establishments in 1902, 1903, and 1904.

Defendant's counsel and others employed to assist them, through months of labor and at an expenditure of thousands of dollars, have, as I am informed and believe, interviewed a large number of people who, at one time or another, worked for the Dunkley Company during the years 1902, 1903 and 1904; on information and belief, I assert that the statements of said people, who were familiar with the facts, are to the effect that the first device, ever made by Dunkley and embodying the invention disclosed in the patent in suit, was his so-called "model machine," and that such model was commenced subsequent to July, 1903, and completed and first tested in October, 1903; and that Dunkley's first commercial machine, embodying said invention, was not completed until the middle of 1904 and was first used during the 1904 peach season; in other words, the statements of said numerous persons show that my two anticipating peach machines commenced in April, 1903, and finished in July, 1903, were constructed, completed and publicly and commercially used in Pasadena and Los Angeles, before Dunkley even commenced to build a model device;

in said eight suits, the two Dunkleys, father and son, and a former employee, H. C. Schau testified said model was made in 1902, and the Dunkleys testified the first commercial machine was made in 1903; on information and belief, I assert that defendant's representatives have arranged with from thirty to fifty persons, familiar with various facts pertaining to the construction of said two first Dunkley machines, to come to California to testify in this case in May and, further, that the testimony of said numerous witnesses will demonstrate the falsity of the testimony given by the Dunkleys and Schau in said eight cases and on which testimony, the decision therein was based; I am informed plaintiffs' representatives have full knowledge of the aforesaid facts and, therefore, believe and assert that the sole motive, prompting plaintiff to attempt to dismiss this suit, is to prevent an exposure of the truth and to defeat justice.

If this suit be dismissed, defendant may never be able to prevail on said witnesses or many of them, to come here to testify in any subsequent suit plaintiff may and undoubtedly will bring against defendant, at a time best adapted to suit the aims and ends of plaintiff, and, at a time, best adapted to prevent the truth being disclosed and demonstrated.

In connection with the issuance of said license to the Anderson-Barngrover Manufacturing Company, I neglected to state that, prior to the issuance thereof, I told Mr. W. C. Anderson, the President thereof, about my said conversation with Mr. S. J. Dunkley and his statement that my said machine, covered by my said patent, did not infringe the Dunkley patent

in suit, and I believe and have been informed, that it was, in reliance on said statement, that the Anderson-Barngrover Manufacturing Company accepted said license and engaged upon the manufacture of my said patented machine; that if this suit be dismissed, my said patent is rendered valueless, because no one will desire to purchase a machine of the type disclosed therein in view of plaintiffs' charges of infringement and threats of litigation; in view of the said alleged interference charged by plaintiff to exist between my patent and the Dunkley patent in suit, I respectfully submit defendant is entitled to the affirmative relief of a decisive adjudging that no interference, in fact or law, exists between such patents and to a decisive determining the rights of the parties and the right of others to use my patented machine, I therefore respectfully submit that a dismissal of this suit, will deprive defendant of affirmative relief to which it is entitled under the pleadings and in view of the facts herein set forth.

In order to make the situation clear, I wish to state that defendants' use of the machine, built by me in 1903, was discontinued in 1914 and during the 1915 season and every succeeding peach season, defendant use the machine like that disclosed in my said patent and which does not employ *peeling jets of water* to remove the disintegrated skin; and inspection of the Dunkley patent in suit, shows it is limited to a machine in which such "*peeling jets of water*" are used and the use thereof is an essential feature of such machine; I wish to state further, that in said eight suits heretofore decided, my said patented machine

42 *Central California Canneries Company et al.*

was not involved and the decisions rendered in said suits in no way relate to the possible infringement of such Dunkley patent by said machine.

GEORGE E. GRIER.

Subscribed and sworn to before me this 25th day of March, 1918.

[Seal] C. L. BAGLEY,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. C-8—Eq. In the United States District Court, Southern District of California, Southern Division. Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant. Affidavit of George E. Grier. Filed Mar. 25, 1918. Chas. N. Williams, Clerk. T. F. Green, Deputy. Kemper B. Campbell, Attorney at Law, 810-821 California Building, cor. 2d and Broadway, Phones: Home 60429, Main 2136, Los Angeles, Cal.

At a stated term, to wit, the January Term, A. D. 1918, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-fifth day of March, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. C-8—Eq.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Minutes of Court—March 25, 1918—Order of Submission of Motion for Continuance, etc., in Dunkley Co. v. Pasadena Canning Co.

This cause coming on this day for the hearing of plaintiff's motion for discontinuance, and defendant's motion to amend answer; John H. Miller, Esq., appearing as counsel for plaintiff; N. A. Acker, Esq., and F. S. Lyon, Esq., appearing as counsel for defendant; good cause appearing, IT IS ORDERED that this cause be and the same hereby is continued until 2 o'clock P. M. of this day for the hearing of said motions; and now, at the hour of 2 o'clock P. M., court having reconvened; John H. Miller, Esq., appearing as counsel for plaintiff; Kemper B. Campbell, Esq., N. A. Acker, Esq., and F. S. Lyon, Esq., appearing as counsel for the defendant; on motion of Kemper B. Campbell, Esq., IT IS ORDERED that Francis J. Heney, Esq., and Wm. J. Carr, Esq., be associated with Messrs. Campbell, Acker and Lyon, as counsel for defendants; and argument in support of said motion for discontinuance having been made by counsel for plaintiff, and reply argument having been made by F. S. Lyon, Esq., of counsel for defendant; IT IS

ORDERED that this cause be submitted to the Court on pleadings, argument and authorities cited, for its consideration and decision.

In the Southern Division of the United States District Court for the Southern District of California, Southern Division.

No. C-8—IN EQUITY.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Notice of Motion to Dismiss Suit.

To Frederick S. Lyon, Kemper B. Campbell, William K. White, F. J. Heney and N. A. Acker, Esqs., attorneys for defendant:

TAKE NOTICE that on Monday, the 15th day of April, 1918, at the opening of court on that day, or as soon thereafter as counsel can be heard, plaintiff in this case will move the above-entitled court at the courtroom thereof in the city of Los Angeles, State of California, that an order be duly made and entered granting the petition and motion of plaintiff for leave to dismiss the above-entitled suit without prejudice to the right of the new Dunkley Company to begin a new suit in said court.

The grounds of the motion are that since the commencement of this suit plaintiff has sold and

assigned the patent sued on to another person not a party to the suit and does not desire to prosecute the suit any further, but said other person desires to file a new suit against defendant for infringement of the patent in suit and another patent issued since the commencement of the above-entitled suit.

Upon the hearing of the motion plaintiff will use, read, and refer to the petition for leave to dismiss and the affidavits of S. J. Dunkley and John H. Miller hereto annexed, and the papers and pleadings on file in the case.

Yours, etc.,

JOHN H. MILLER,

Attorney for Plaintiff.

Los Angeles address: C/o Raymond Ives Blakeslee,
728-29-30 California Bldg.

Dated April 10th, 1918.

Order Shortening Time.

On cause shown ordered that the time for serving these papers be shortened so that the motion may be heard on April 15th, 1918. Copies to be served April 11, 1918.

BLEDSON,

U. S. District Judge.

In the Southern Division of the United States District Court for the Southern District of California, Southern Division.

No. C-8—IN EQUITY.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

**Petition of Plaintiff for Leave to Dismiss the
Above-entitled Suit Without Prejudice.**

Now comes plaintiff in the above-entitled suit, formerly known as Dunkley Company but now known as Michigan Canning and Machinery Company, and shows to the Court as follows:

1. This suit was commenced on or about December 21, 1915, and on or about January 16th, 1916, the defendant filed its answer.

2. Said answer does not pray for any affirmative relief nor set up any counterclaim or cross-complaint, nor has any counterclaim or cross-complaint ever been filed by defendant.

3. On the calling of the calendar, in January, 1918, the case was set for trial on May 1st, 1918.

4. On or about February 28, 1918, plaintiff through its attorney, received a notice of motion from defendant for leave to file an amendment to its answer, and said motion has not yet been disposed of.

5. On or about January 12, 1916, the name of the plaintiff was changed to Michigan Canning and Machinery Company under and pursuant to the laws of the State of Michigan in that behalf made and provided.

6. On or about January 12, 1916, a new corporation was formed under the laws of the State of Michigan, entitled "Dunkley Company," which said company is not a party to this suit.

7. That on or about July 25th, 1916, Michigan Canning and Machinery Company, formerly known as Dunkley Company, plaintiff herein, sold and assigned the patent in suit to the new Dunkley Company, and ever since said last-named date said new Dunkley Company, not a party to this suit, has been the owner and holder of said letters patent and also of certain other letters patent of the United States, No. 1,237,623, of August 21, 1917, covering the process for peeling peaches by lye.

8. That said two patents are closely related, one being for a machine and the other being for the process of peeling peaches by lye.

9. The present plaintiff, the old Dunkley Company, now known as the Michigan Canning and Machinery Company, no longer has any interest in this case and the patent in suit, and for that reason does not desire to prosecute the suit any longer.

10. The new Dunkley Company, which is not a party to this suit, desires and intends to file a new suit against the Pasadena Canning Company, defendant herein, for infringement of both of said

patents and desires that the two said patents may be tried out and adjudicated at one trial and at one and the same time, thereby saving the necessity of two trials and avoiding much expense.

11. A motion was heretofore made on or about March 25th, 1918, by the plaintiff for leave to dismiss this case and then argued and submitted, but has not yet been decided.

12. Plaintiff intends the present petition and motion to be a continuation of and supplementary to the aforesaid motion of March 25th, 1918, as well as a new and independent motion on additional grounds not advanced at the hearing of the former motion.

WHEREFORE, plaintiff prays that it be allowed to dismiss this case without prejudice to the commencement of a new one by the new Dunkley Company for infringement of the patent in suit and also of patent No. 1,237,623.

Dated April 10th, 1918.

JOHN H. MILLER,
Atty. for Plaintiff.

In the Southern Division of the United States District Court for the Southern District of California, Southern Division.

No. C-8—IN EQUITY.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Affidavit of S. J. Dunkley in Dunkley Co. v. Pasadena Canning Co.

State of California,

City and County of San Francisco,—ss.

S. J. Dunkley, being duly sworn, deposes and says: I reside at Kalamazoo in the State of Michigan.

Plaintiff in the above-entitled case, Dunkley Company (which will hereinafter be referred to as the old Dunkley Company), was incorporated under the laws of Michigan in the month of March, 1909, and its articles of incorporation were filed in the office of the Secretary of State of the State of Michigan on March 30, 1909. In and by its articles of incorporation it was stated that the principal places at which the business of the company would be carried on were Kalamazoo, Hartford, Mattewan, South Haven, Grant, Shelby and Frankfort, all in the State of Michigan.

Afterwards on or about January 12, 1916, by a certificate made in due form amending the articles of incorporation, the name of said corporation was changed to that of Michigan Canning and Machinery Company, and such certificate was duly recorded in the office of the Secretary of State of Michigan on January 27, 1916.

A copy of said articles of incorporation and the certificate of amendment changing the name thereof are hereunto annexed, and marked Exhibit "A," and specially referred to and by such reference made a part hereof. A copy of the same duly

certified by the Secretary of State of the State of Michigan will be produced at the hearing.

Afterwards, to wit, on January 12, 1916, another corporation was formed under the laws of the State of Michigan having the name "Dunkley Company," and on or about January 27, 1916, copy of the articles of association of this last-named company was filed in the office of the Secretary of State of the State of Michigan (which said company will hereinafter be referred to as the New Dunkley Company). A copy of the articles of incorporation of this said last-named company is hereunto annexed and marked Exhibit "B," and by such reference made a part hereof. The original articles of association of said company will be produced at the hearing.

Thereafter, to wit, on or about July 25th, 1916, the said Michigan Canning & Machinery Company (being the plaintiff herein after the change of its name from Dunkley Company as aforesaid) by an instrument in writing duly executed and acknowledged, sold, assigned and transferred the whole right, title and interest in and to the said letters patent No. 1,104,175 of July 21, 1914, being the patent sued on, to the said new Dunkley Company, which was incorporated on or about the 12th day of January, 1916, as hereinabove alleged. The said assignment was duly recorded in the Patent Office of the United States on September 21, 1916, in Liber Q 101, page 59, of Transfers of Patents, and ever since said assignment the said new Dunkley Company has been and is now the sole owner

and holder of the said letters patent and of all the rights, liberties and privileges by them granted. A copy of the said assignment is hereunto annexed and marked Exhibit "C."

By virtue of the premises the old Dunkley Company, plaintiff in this case, now known as the Michigan Canning and Machinery Company, has ceased to have any right, title, or interest in the patent sued on or the cause of action sued on, and no longer has any cause of action against the defendant herein, in respect of the matters alleged in the bill.

WHEREFORE, the old Dunkley Company, now known as the Michigan Canning and Machinery Company, desires to dismiss this suit without prejudice to the right of the new Dunkley Company to commence another suit against the Pasadena Canning Company for the same cause of action.

SAMUEL J. DUNKLEY.

Subscribed and sworn to before me this 10th day of April, 1918.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of
San Francisco, State of California.

Exhibit "A"—Articles of Association of Dunkley Company.

We, the undersigned, desiring to become incorporated under the provisions of Act No. 232, of the Public Acts of 1903, entitled "An act to revise and consolidate the laws providing for the incorporation of manufacturing and mercantile companies or any

union of the two, and for the incorporation of companies for carrying on any other lawful business, except such as are precluded from organization under this act by its express provisions, and to prescribe the powers and fix the duties and liabilities of such corporations," and the acts amendatory thereof and supplementary thereto, do hereby make, execute and adopt the following articles of association, to wit:

ARTICLE I.

The name assumed by this association, and by which it shall be known in law, is

DUNKLEY COMPANY.

ARTICLE II.

For purpose or purposes of this corporation are as follows:

For the canning, preserving, growing, buying and selling of fruit, vegetables, beans, cereals and their products, also the manufacturing, buying and selling of all materials and supplies used in said business, also the erection and owning, building of factories, warehouses, elevators and operating shipping stations, so far as incident to and necessary to the carrying out of said purpose.

ARTICLE III.

The principal places at which operations are to be conducted are at Kalamazoo, in the county of Kalamazoo, State of Michigan; Hartford, Van Buren Co., Michigan; Mattewan, Van Buren County, Michigan; South Haven, Van Buren Co., Michigan; Grant, Newaygo County, Michigan; Shelby,

Oceana County, Michigan; Frankfort, Benzie County, Michigan.

ARTICLE IV.

The capital stock of the corporation hereby organized is the sum of one hundred twenty-five thousand (\$125,000.00) dollars.

ARTICLE V.

The number of shares into which the capital stock is divided is twelve hundred fifty shares of the par value of one hundred dollars each.

ARTICLE VI.

The amount of capital stock subscribed is the sum of eighty thousand (\$80,000.00) dollars.

ARTICLE VII.

The amount of said stock actually paid in at the date hereof is the sum of eighty thousand (\$80,000) dollars, which amount has been paid in in cash.

ARTICLE VIII.

The office in the State of Michigan for the transaction of business shall be kept at Kalamazoo, Michigan.

ARTICLE IX.

The term of existence of this corporation is fixed at thirty years from the date hereof.

ARTICLE X.

The names of the stockholders, their respective residences and the number of shares of stock subscribed for by each are as follows:

Names	Residence	No. of Shares
F. E. Lewellyn	Shelby, Michigan	390
M. E. Lewellyn	Shelby, Michigan	260
Carl Lans	Shelby, Michigan	150

IN WITNESS WHEREOF, We, the parties hereby associating, for the purpose of giving legal effect to these articles, hereunto sign our names, this 25th day of March, A. D. 1909.

Names	Names
F. E. LEWELLYN	M. E. LEWELLYN
CARL LANS,	

State of Michigan,
County of Oceana,—ss.

On this 25th day of March, 1909, before me, a notary public in and for said county, personally appeared F. E. Lewellyn, M. E. Lewellyn, Carl Lans, all of Shelby, Mich., known to me to be the persons named in, and who executed the foregoing instrument, and severally acknowledged that they executed the same freely and for the intents and purposes therein mentioned.

[Seal]

C. L. CHURCHILL,
Notary Public.

My commission expires Jan. 23, 1910.

Recorded March 30, 1909. (7 fol.)

CERTIFICATE OF AMENDMENT TO THE
ARTICLES OF ASSOCIATION OF THE
DUNKLEY COMPANY.

P. O. ADDRESS—Kalamazoo, Michigan.

WE, THE UNDERSIGNED, being the president and the secretary of the Dunkley Company, a corporation existing under the provisions of Act No. 232 of the Public Acts of 1903, do hereby certify, as required by section 17 of said act:

That at a meeting of the stockholders of said cor-

poration expressly called for the purpose of amending its articles of association and held at the office of said company on the 21st day of October, A. D. 1915, it was resolved, by a vote of two-thirds of the capital stock of said corporation, that Articles Nos. I and VIII of the articles of association be and the same are amended so as to read as follows, viz.:

ARTICLE I.

The name assumed by this association, and by which it shall be known in law, is MICHIGAN CANNING & MACHINERY COMPANY.

ARTICLE VIII.

The office in the State of Michigan, for the transaction of business, shall be kept at Kalamazoo, Michigan. The principal office of the corporation shall be located at Room 1200, 76 West Monroe St., in the City of Chicago, Cook County, Illinois.

IN WITNESS WHEREOF we hereunto sign our names this 12th day of January, A. D. 1916.

PHILIP LARMON,

President.

[Corporate Seal]

SAMUEL J. DUNKLEY,

Secretary.

Recorded January 27, 1916. (3 fol.)

Exhibit "B"—Articles of Association of Dunkley Company.

(COMMON AND PREFERRED STOCK.)

We, the undersigned, desiring to become incorporated under the provisions of Act No. 232, of the Public Acts of 1903, entitled "An act to revise and

consolidate the laws providing for the incorporation of manufacturing and mercantile companies or any union of the two, and for the incorporation of companies for carrying on any other lawful business, except such as are precluded from organization under this act by its express provisions and to prescribe the powers and fix the duties and liabilities of such corporations'' and the acts amendatory thereof and following articles of association, to wit:

ARTICLE I.

The name of this association, and by which it shall be known in law, is

DUNKLEY COMPANY.

ARTICLE II.

The purpose or purposes of this corporation are as follows:

To manufacture, deal in, build, install, prepare, buy, sell, lease exchange or otherwise acquire or dispose of all kinds of machinery and also all accessories, apparatus and appliances which may be used for or in connection with the canning or preserving of fruits, vegetables and cereals and the products thereof, and all other food products; and also to can, preserve or otherwise prepare for use as food, all kinds of fruits, vegetables and cereals and all other food products.

ARTICLE III.

The principal place at which operations are to be conducted is at Kalamazoo in the county of Kalamazoo, State of Michigan.

ARTICLE IV.

The capital stock of the corporation hereby organ-

ized is the sum of \$300,000.00 *dollars*, of which \$200,000.00 *dollars* shall be common stock, and \$100,00.00 *dollars* shall be preferred stock. The preferred stock shall be subject to redemption at par on the 1st day of July, A. D. 1945 or at any time prior thereto in the discretion of the directors at 105% and the holder shall be entitled to a dividend of 7 per cent per annum, payable quarterly at such times as the directors shall determine which shall be cumulative and payable before any dividend shall be set apart or paid on the common stock. The preferred stockholders shall not be entitled to vote for directors, nor at any meeting of the stockholders of said corporation except as may be provided by statute.

ARTICLE V.

The number of shares into which the capital stock is divided is 3000 of the par value of \$100.00 *dollars* each.

ARTICLE VI.

The amount of common stock subscribed is \$200,000.00 *dollars*. The amount of preferred stock subscribed is \$40,000.00 *dollars*.

ARTICLE VII.

The amount of common stock actually paid in is the sum of Two Hundred Thousand (\$200,000) dollars, of which no dollars has been paid in cash, and Two Hundred Thousand (\$200,000) dollars has been paid in other property, an itemized description of which, with the valuation at which each item is taken, is as follows, viz.:

Letters patent of the United States issued to Mel-

ville E. Dunkley for an improvement in cherry stemming machines, which letters patent are numbered 1,029,918, and bear date the 18th day of June, in the year 1912. Said letters patent have been assigned to the corporation and are assignable by it.

The amount of preferred stock actually paid in is the sum of \$40,000.00 *dollars* of which \$4,000.00 has been paid in cash.

ARTICLE VIII.

The office in the State of Michigan, for the transaction of business shall be kept at Kalamazoo, Michigan.

The principal office of the corporation shall be located at Room 1200, No. 76 West Monroe Street, Chicago, Illinois.

ARTICLE IX.

The term of existence of this corporation is fixed at thirty years from the date hereof.

ARTICLE X.

The names of the stockholders, their respective residences, and the number of shares of stock subscribed for by each are as follows:

Names.	Residence.	No. of Shares.	
		Common.	Preferred.
William F. Burrows,	4847 Woodlawn Avenue, Chicago, Ill.		400
Samuel J. Dunkley,	111 South West St., Kalamazoo, Mich.		1
Melville E. Dunkley,	111 South West St., Kalamazoo, Mich.	1999	

IN WITNESS WHEREOF, We, the parties hereby associating, for the purpose of giving legal effect to these articles, hereunto sign our names, this 12th day of January, A. D. 1916.

Names.

William F. Burrows.

Samuel J. Dunkley.

Melville E. Dunkley.

State of Michigan,

County of Kalamazoo,—ss.

On this twelfth day of January, 1916, before me, a notary public in and for said county, personally appeared Samuel J. Dunkley and Melville E. Dunkley, known to me to be the persons named in, and which executed the foregoing instrument, and severally acknowledged that they executed the same freely and for the intents and purposes therein mentioned.

FRED G. STANLEY,

Notary Public,

Kalamazoo County, Michigan.

My commission expires July 11, 1917.

State of Illinois,

County of Cook,—ss.

On this thirteenth day of January, 1916, before me, a notary public in and for said county, personally appeared William F. Burrows, known to me to be the person named in, and who executed the foregoing instrument and *severally* acknowledged that *they* executed the same freely and for the intents and purposes therein mentioned.

[Seal]

ALBERT BETTCHER,

Notary Public.

My commission expires July 29, 1917.

State of Illinois,
County of Cook,—ss.

William F. Burrows, being duly sworn, does depose and say that he is one of the organizers of the DUNKLEY COMPANY WHOSE articles of association are hereto attached; that he knows the property described in article seven of such articles of association and taken in payment for capital stock, and that the same has been actually transferred to such corporation, and further says that said property is of the actual value of Two Hundred Thousand (\$200,000) dollars. And further says not.

(Signed) WILLIAM F. BURROWS.

Subscribed and sworn to before me this 13th day of January, 1916.

[Seal]

ALBERT BETTCHER,
Notary Public.

My commission expires July 29, 1917.

State of Michigan,
County of Kalamazoo,—ss.

Samuel J. Dunkley and Melville E. Dunkley, being duly sworn, do depose and say that they are two of the organizers of the DUNKLEY COMPANY whose articles of association are hereto attached; that they know the property described in article seven of such articles of association and taken in payment for capital stock, and that the same has been actually transferred to such corporation, and further say that said property is of the actual value

of Two Hundred Thousand (\$200,000) dollars. And further say not.

SAMUEL J. DUNKLEY.

MELVILLE E. DUNKLEY.

Subscribed and sworn to before me this 12th day of January, A. D. 1916.

FRED G. STANLEY,
Notary Public.

My commission expires July 11, 1917.

[Endorsed]:

(Common and Preferred Stock.)

ARTICLES OF ASSOCIATION

OF

DUNKLEY COMPANY.

Under Act No. 232, Public Acts of 1903.

Department of State,
Lansing, Mich.

Received for Record the 27th day of Jan., A. D. 1916, and recorded in record of Corporations No. 157 on page 403.

C. C. VAUGHAN,
Secretary of State.

County Clerk's Office,
Kalamazoo, Michigan,—ss.

Received for Record the 8th day of Feb., A. D. 1916, and recorded in Record of Corporations No. 6 on page 109.

EDWARD F. CURTINIOUS,
County Clerk.

Exhibit "C," Assignment, Michigan Canning & Machinery Co. to Dunkley Co.

WHEREAS, MICHIGAN CANNING & MACHINERY COMPANY (former name Dunkley Company), of Kalamazoo, Michigan, a corporation duly incorporated and existing under the laws of Michigan, did obtain letters patent of the United States for an improvement in Machines for Peeling Peaches and other Fruit, which letters patent are numbered 1,104,175 and bear date the 21st day of July, 1914; and

WHEREAS, said Michigan Canning & Machinery Company is now the sole owner of said patent and of all rights under the same; and

WHEREAS, the Dunkley Company, a corporation duly incorporated and existing under the laws of the State of Michigan, is desirous of acquiring the entire interest in the same;

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN, be it known that, for and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations to it in hand paid, the receipt of which is hereby acknowledged, the said Michigan Canning & Machinery Company has sold, assigned and transferred, and by these presents does sell, assign and transfer unto the said Dunkley Company, the whole right, title and interest in and to the said improvement in Machines for Peeling Peaches and other Fruit, and in and to the letters patent therefor aforesaid; the same to be held and enjoyed by the said Dunkley Company for its

own use and behoof and for the use and behoof of its legal successors and assigns to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by it had this assignment and sale not been made.

IN WITNESS WHEREOF, the Michigan Canning & Machinery Company has caused this instrument to be executed in its corporate name and in its behalf by its President and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its Secretary, this 25th day of July, 1916.

MICHIGAN CANNING & MACHINERY
COMPANY.

By PHILIP LARMON,
President.

[Seal] Attest: SAMUEL J. DUNKLEY,
Secretary.

State of Illinois,
County of Cook,—ss.

I, Albert Bettcher, a notary public in and for said County in the State aforesaid, do hereby certify that Philip Larmon, President of the Michigan Canning & Machinery Company, personally known to me to be the same person whose name is subscribed to the foregoing instrument as such President and to be such President, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as the free and voluntary act of said Michigan Canning & Machinery Company and as his own free and voluntary act as such President,

for the uses and purposes therein set forth.

GIVEN under my hand and official seal this 25th day of July, 1916.

[Notary Seal] ALBERT BETTCHER,
Notary Public, Cook County, Illinois.

Recorded September 21, 1916, U. S. Patent Office,
Liber Q 101, page 59 of Transfers of Patents.
MW/V.

*In the Southern Division of the United States Dis-
trict Court for the Southern District of Califor-
nia, Southern Division.*

No. C-8—IN EQUITY.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Affidavit of John H. Miller.

State of California,

City and County of San Francisco,—ss.

John H. Miller, being duly sworn, deposes and says: I am the attorney of record for the plaintiff in the above-entitled suit. Heretofore on or about March 25th, 1918, on behalf of plaintiff, I made a motion before the above-entitled court for leave to dismiss this suit, and the said motion was then and there argued and submitted. At that time I did not know and since the submission of said motion I have learned that on or about January 12, 1916, the name

of the plaintiff company was changed to that of Michigan Canning and Machinery Company, and that on or about July 25, 1916, said Michigan Canning and Machinery Company sold and assigned the patent in suit to another company not a party to this suit, named Dunkley Company, incorporated under the laws of the State of Michigan in January, 1916. If I had known of these facts at the time of the argument of the former motion I would have notified the Court thereof, but I was not informed of said facts at that time. On April 1, 1918, I was informed of these facts by a telegram from Chicago, and on April 8th I received the formal papers establishing the facts, copies of which said papers are annexed to the affidavit of S. J. Dunkley herewith filed.

It is not the intention of the new Dunkley Company to abandon the cause of action sued on herein, but it is the intention of said new Dunkley Company to begin a new suit in this court against the Pasadena Canning Company for infringement of Patent No. 1,104,175 and to join therewith another cause of action against the defendant herein for infringement of another patent owned by the new Dunkley Company, letters patent No. 1,237,623 of August 21, 1917, this last-named patent having been issued after the commencement of the present suit.

It is the intention of the new company to file this new suit at the earliest practicable moment to the end that both of said patents above mentioned may be tried out and adjudicated in one and the same case, thereby avoiding the necessity of having two trials. This second Dunkley patent, viz., No.

1,237,623, is for a process of peeling peaches by lye, whereas the first Dunkley patent, No. 1,104,175, is for a machine for peeling peaches by lye. The two patents are closely related to each other and it is to the interest of the new Dunkley Company that the two patents should be adjudicated at one and the same time without the necessity of separate trials, thereby saving both time and expense.

In the answer of the defendant, heretofore filed in the above-entitled case, no affirmative relief has been asked nor has any counterclaim or cross-complaint been filed, nor has any right accrued to the defendant which would be prejudiced by a dismissal of the suit at this time, so far as this affiant is aware. There is still pending before this court a motion by defendant for leave to amend its answer, but no affirmative relief is asked by the amendment.

JOHN H. MILLER.

Subscribed and sworn to before me this 9th day of April, 1918.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Service of the within motion to dismiss suit and affidavits in support thereof admitted this 11th day of April, A. D. 1918.

KEMPER B. CAMPBELL,
FREDERICK S. LYON et al.,
Attorneys for Defendant.

No. C-8. United States District Court, Southern District of California, Southern Division. Dunkley

Company vs. Pasadena Canning Co. Notice of Motion and Motion to Dismiss Suit and Affidavits in Support Thereof. Filed Apr. 11, 1918. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. John H. Miller, Attorney at Law, 723-4-5-6 Crocker Building, San Francisco, Cal., for Plaintiff.

*United States District Court, Southern District of
California, Southern Division.*

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Affidavit of Kemper B. Campbell.

State of California,

County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn, deposes and says: That he is one of the attorneys of record for the defendant in the above-entitled suit; that this suit has been pending in this court since December 21, 1915; that at the call of the trial calendar in this court on the second Monday in January, 1918, plaintiff was represented in court by counsel and when this cause was called upon the calendar, stated that plaintiff desired the case set for an early and immediate trial and suggested that it be set early in April; that after hearing counsel for both sides, the Court set this case for trial on May 1st, 1918; that in the case of the same plaintiff against Central

California Canneries and the same plaintiff against certain other defendants in which interlocutory decrees were entered in the United States District Court for the Northern District of California, ordering an injunction on December 8th, 1916, plaintiff in this case, after the entry of said interlocutory decrees, moved said Court for an increase of the supersedeas bonds in each of said cases and thereafter filed motions for increase of said supersedeas bonds in the United States Circuit Court of Appeals, for the Ninth Circuit in two of said cases, notwithstanding the fact that the plaintiff in this case as it now appears from the affidavit of Samuel J. Dunkley herein, had prior to the entry of such interlocutory decrees and prior to the decision of any of said causes by the District Court, transferred the legal title to the patent in suit to another corporation and had divested itself of all right to equitable relief, and pursuant to such policy of prosecuting said cases and this case as though plaintiff were still entitled to equitable relief herein and intended to force the trial of this case, plaintiff moved the setting of this case for trial as aforesaid.

That relying upon the representations of plaintiff and plaintiff's counsel at the time of asking that this be set for trial, defendant has to date incurred expenses for attorneys' fees, witness' fees, taking of depositions, investigations, et cetera, and other expenses necessarily incidental to preparation for said trial, a sum in excess of Twenty-nine Thousand Dollars (\$29,000.00), all of which has been incurred by defendant by reason of the vexatious proceedings

and conduct of plaintiff and plaintiff's attorneys in this cause after plaintiff had transferred the title to said patent as set forth in the motion filed by plaintiff herein.

That prior to the filing of the last Notice of Motion to Dismiss and the affidavits accompanying the same, and prior to any notice to defendant of the alleged assignment of the patent in suit, defendant has caused to be taken in the State of Michigan a number of depositions for use in the trial of this action; that in the taking of said depositions, defendant was represented by an attorney who was sent to the State of Michigan from the State of California for the purpose of taking said depositions; that plaintiff was also represented in the taking of said depositions by Fred L. Chappell, Esquire, leading counsel for plaintiff and also counsel for the alleged new Dunkley Company and apparently acting for both corporations.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 15th day of April, 1918.

[Seal]

J. H. ARDIS,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. In Equity — No. C-8. United States District Court, Southern District of California, Southern Division. Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant. Affidavit of Kemper B. Campbell. Filed Apr. 15, 1918. Chas. N. Williams, Clerk. Geo. W. Fenimore, Deputy. Kemper B. Campbell, Attorney at

Law, 810-821 California Building, cor. 2d and Broadway, Phones: Home 60429, Main 2136, Los Angeles, Cal.

I, Chas. N. Williams, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of each of the original papers filed, or minute orders made and entered, as follows, to wit: Discontinuance of Suit, filed March 18th, 1918; Minute Order made and entered March 18th, 1918; Affidavit of Kemper B. Campbell, filed March 25th, 1918; Affidavit of George E. Grier, filed March 25th, 1918; Minute Order made and entered March 25th, 1918; Notice of Motion to Dismiss Suit and Petition of Plaintiff for Leave to Dismiss Suit Without Prejudice, with affidavit and exhibit attached, filed April 15th, 1918, and Affidavit of Kemper B. Campbell, filed April 15th, 1918; all in the cause entitled Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant, No. C-8—Equity, Southern Division, as the same remains on file and of record therein.

ATTEST my hand and the seal of said District Court, this 16th day of April, A. D. 1918.

[Seal]

CHAS. N. WILLIAMS,
Clerk.

By R. S. Zimmerman,
Deputy Clerk.

[Endorsed]: No. 2915. U. S. Circuit Court of Appeals for the Ninth Circuit. Central California Canneries Company et al., Appellants, vs. Dunkley

Company, Appellee. Affidavit of W. K. White.
Filed Apr. 19, 1918. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2915.

CENTRAL CALIFORNIA CANNERIES COM-
PANY,

Appellant,

GRIFFIN & SKELLEY COMPANY,

Appellant,

J. C. AINSLEY PACKING COMPANY,

Appellant,

ANDERSON-BARNGROVER MANUFACTUR-
ING COMPANY,

Appellant,

GOLDEN GATE PACKING COMPANY,

Appellant,

J. F. PYLE & SONS, INC.,

Appellant,

HUNT BROTHERS COMPANY,

Appellant,

SUNLIT FRUIT COMPANY,

Appellant,

vs.

DUNKLEY COMPANY,

Appellee.

Order Staying Issuance of Mandates.

On the affidavit of William K. White and other good cause shown, it is hereby

ORDERED, that the issuance of the respective mandates in the above-entitled suits, and of each of them, be and is hereby stayed to and including May 6, 1918, and,

In the event of the filing herein, before said 6th day of May, 1918, and noticed for hearing on said date, of the motion referred to in said affidavit, it is further

ORDERED that the issuance of said mandates and of each of them, be stayed until said motion is passed on and decided by the Court.

Dated April 19, 1918.

WM. W. MORROW,
W. H. HUNT,
Circuit Judges.

[Endorsed]: No. 2915. U. S. Circuit Court of Appeals for the Ninth Circuit. Central California Canneries Company et al., Appellants, vs. Dunkley Company, Appellee. Order Staying Issuance of Mandates. Filed Apr. 19, 1918. F. D. Monekton, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit. 7

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of
San Francisco, Who is Now Succeeded by EDWARD WHITE, as
Commissioner of Immigration at Said Port,

Appellant,

vs.

HARRY KATZ,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

Filed

JAN 25 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of
San Francisco, Who is Now Succeeded by EDWARD WHITE, as
Commissioner of Immigration at Said Port,
Appellant,

vs.

HARRY KATZ,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Assignment of Errors.....	34
Attorneys of Record, Names of.....	1
Certificate of Clerk U. S. District Court to Transcript on Appeal.....	40
Citation on Appeal—Original.....	41
Demurrer to Petition for Writ of Habeas Cor- pus.....	13
Names of Attorneys of Record....	1
Notice of Appeal.....	38
Opinion and Order Overruling Demurrer and Directing Writ of Issue.....	14
Order Allowing Appeal.....	37
Order Discharging Petitioner.....	31
Order for Transmission of Original Exhibits...	39
Order of Discharge.....	32
Order to Show Cause.....	12
Petition for Appeal.....	33
Petition for Writ of Habeas Corpus.....	2
Praecipe for Transcript of Record.....	1
Return on Service of Writ.....	17
Return to Petition for Writ of Habeas Corpus..	17
Traverse to Return to Order to Show Cause Why Writ of Habeas Corpus Should not Issue..	28
Writ of Habeas Corpus.....	16

Names of Attorneys of Record.

For the Respondent and Appellant: U. S. ATTORNEY.

For the Petitioner and Appellee: MARSHALL B. WOODWORTH, Esq., and S. LUKE HOWE, Esq., San Francisco.

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,752.

In the Matter of HARRY KATZ on Habeas Corpus.

Praeceptum for Transcript of Record.

To the Clerk of said Court:

Sir: Please copy the following papers to be used on appeal in the above-entitled cause:

1. Petition for Writ of Habeas Corpus, consisting of first nine pages thereof, thus omitting exhibits.
2. Order to Show Cause.
3. Demurrer to Petition.
4. Opinion and Order Overruling Demurrer and Directing Writ to Issue.
5. Writ of Habeas Corpus and Marshal's Return to Service thereof.
6. Return to Petition.
7. Traverse to Return.
8. Order of Discharge.
9. Order Discharging Petitioner.
10. Respondent's Exhibit "A" incorporated into and made a part of Return.

11. Stipulation of Attorneys for an Order of Court transferring record of the Bureau of Immigration to the United States Circuit Court of Appeals.

JNO. W. PRESTON,
United States Attorney.

CASPER A. ORNBAUN,
Asst. United States Attorney.

Dated this 28th day of June, 1916.

[Endorsed]: Filed June 28, 1916. W. B. Maling,
Clerk. By Lyle S. Morris Deputy Clerk. [1*]

*In the District Court of the United States, Northern
District of California, First Division.*

(No. 15,752.)

In the Matter of HARRY KATZ, on Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable, the said District Court of the
United States, Northern District of California,
First Division:

The petition of the above named respectfully sets
forth and states:

(I)

That the petitioner, Harry Katz, is a resident of the city of Sacramento, State and Northern District of California, and has been a regularly domiciled resident of said State and Northern District of California continuously last past for the period of fourteen years; that he first arrived and lawfully entered

*Page-number appearing at foot of page of original certified Transcript of Record.

the United States at the port of New York in the year 1901, with the then intention of permanently remaining and residing in the United States and of becoming a regularly domiciled resident, denizen and inhabitant of the United States, and a citizen thereof, and that he has since continuously resided in the United States with the exception of a temporary brief trip made to England at the time of the death of his father, and that during all of said time, since his arrival in the United States, he has been, and now is, a regularly domiciled resident, denizen and inhabitant of the State and Northern District of California, and of the United States of America, and, up to and at the time of the unlawful detention, [2] restraint and imprisonment hereinafter complained of, was lawfully and regularly domiciled and living in the city of Sacramento, State and Northern District of California, and had and has no home, abode or domicile elsewhere.

That your petitioner, when he first arrived in the United States, plied his trade as barber and afterwards became and now is a chiropodist, actively engaged as such; that he has offices in Stockton and Sacramento, and makes occasional business trips to towns and villages in and around Stockton and Sacramento, for the purpose of obtaining and visiting his patients; that he is a hard-working, industrious and frugal man, who has saved up his money and that he has made some small investments in buying and selling real estate.

(II)

That your said petitioner is unlawfully imprisoned,

restrained, confined and detained of his liberty by the Commissioner of Immigration at the port of San Francisco, and is about to be taken from his domicile and abode in the State of California, and from his domicile and abode in the United States of America, and sent against his will to the Kingdom of Great Britain, of which he is not a resident and has not been for very many years and in which he has no domicile, abode, home or residence.

That the illegality of said imprisonment, detention, confinement and restraint consists in this:

That the said Commissioner of Immigration claims to have the legal right to, and does, hold the said petitioner in imprisonment and detention, and claims the right and is about to deport and banish him from the State of California and from the United States by virtue of and under the authority of a [3] pretended warrant of deportation directing him so to deport and banish him, which said warrant, it is claimed by said Commissioner of Immigration, was issued by the Secretary of Labor under and by virtue of the laws of the United States made and promulgated to regulate and provide for the deportation of certain alien persons, to wit, under the authority of the Immigration Act of February 20, 1907 (34 Stat. 898), as amended by the Act of March 26, 1910, (36 Stat. 263.)

That the said Secretary of Labor and the said Commissioner of Immigration had, and now have, no jurisdiction or lawful authority so to deport or banish the said petitioner from the United States for the following reasons, to wit:

First. That your petitioner did not have any legal hearing upon the charges made against him in the warrant of arrest issued against him dated March 18, 1914, a copy of which warrant of arrest is appended hereto, marked Exhibit "A," and made a part hereof;

Second. That this petitioner is not amenable to any of the provisions of the Act of February 20, 1907, as amended by the Act of March 26, 1910, in that there was and is no sufficient legal or competent or any, evidence showing that he is unlawfully within the United States in that he has been found connected with the management of a house of prostitution; and that he has been found receiving, sharing in or deriving benefit from the earnings of a prostitute, or prostitutes;

Third. That there was and is no sufficient, or any, warrant of arrest authorizing the Commissioner of Immigration at Angel Island, California, or any of his subordinates, to arrest this petitioner and entertain or proceed to entertain [4] any hearings or proceedings whatsoever upon any charge or charges arising out of any act or acts of this petitioner under the provisions of the Act of February 20, 1907, as amended by the Act of March 26, 1910;

Fourth. That there was and is no sufficient, or any, warrant of deportation authorizing the Commissioner of Immigration at Angel Island, California, in whose custody, confinement, restraint and imprisonment this petitioner now is, to deport this petitioner from the port of San Francisco to a foreign country or elsewhere, or to hold this petitioner in

detention and imprisonment for any purpose whatsoever;

Fifth. That this petitioner was and is ordered deported without any due process of law, or proof of any kind or character proving or tending to prove said alleged charges made against him.

(III)

This petitioner further alleges that, before any pretended warrant of deportation was issued against him as aforesaid, the said petitioner was denied by the said Secretary of Labor and by the Immigration officers at the port of San Francisco that full and fair hearing guaranteed by the law and, in that behalf, your petitioner alleges as follows:

First. That your petitioner was subjected to private and secret investigations and examinations without his consent and compelled to be a witness against himself without first having been advised and informed of the charges pending against him and of his rights in the matter and of the fact that any statement made by him might, could and would be used against him, and that the consequences of any unfavorable decision would result in his deportation and banishment, and without [5] being allowed or permitted first to be advised by, or have the benefit of legal counsel;

Second. That the so-called evidence attempted to be presented and introduced against your petitioner, upon which said pretended warrant of deportation is based, consists of statements based on information and belief, contained in affidavits, without any opportunity whatever of cross-examining the persons mak-

ing said affidavits, or without any notice whatever to said petitioner, or to his attorneys, or any of them, that said persons were about to, or would, swear to said affidavits, and consists, further, of *ex parte* and hearsay statements, matters of opinion, conjecture and surmise, private reports and other matter of an incompetent, immaterial and irrelevant character, not permitted to be admitted in the courts of justice of the United States, State or Federal, and wholly insufficient to support any of the charges upon which it is sought to deport this petitioner, all of which will more fully appear by reference to a copy of the proceedings before said Commissioner of Immigration and the Secretary of Commerce and Labor, made a part hereof and marked Exhibits "A" to "VVV";

Third. Your petitioner further alleges that the said Immigration officers further acted in bad faith and arbitrarily and illegally in said pretended trial, or hearings, in not producing any witnesses or evidence to support the truth of the charges alleged against this petitioner, and in acting wholly and entirely and solely upon statements based on information and belief, contained in affidavits, without any opportunity whatever of cross-examining the persons making said affidavits, or without any notice whatever to said petitioner, or to his [6] attorneys, or any of them, that said persons were about to, or would, swear to said affidavits, and in acting wholly and entirely and solely upon *ex parte* affidavits without an opportunity for cross-examination, and in denying the right of cross-examination as to all of the persons whose affidavits were presented against this petitioner, and in

acting upon hearsay statements and private reports, matters of opinion, conjecture and surmise, and other matter of an incompetent, immaterial, and irrelevant character, not permitted to be admitted in the courts of justice in the United States, State or Federal, and wholly insufficient to support any of the charges upon which it is sought to deport this petitioner, all of which will more fully appear by a reference to a copy of the proceedings hereinabove referred to, attached to this petition and made a part hereof.

(IV)

That said petitioner was denied the right of an appeal from the decision of the Secretary of Commerce and Labor and that the only hearing allowed him was the hearing before the Secretary of Commerce and Labor, at which the warrant of deportation was issued, at which hearing this petitioner was not present and did not have any notice thereof, the other hearings, if any, at Angel Island, California, before the Commissioner of Immigration, being merely in the nature of private detective investigations against this petitioner and of secret examinations of this petitioner without his consent and at times without his presence and without being represented by legal counsel at all stages of the proceedings or even being permitted first to obtain legal advice or being warned or advised as to his rights in the matter or at all. [7]

(V)

That said pretended hearing before said Commissioner of Immigration did not, and does not, constitute a full and fair, or full or fair, hearing within the meaning of the law, in that this petitioner was not

permitted, nor were any of his counsel, to see or peruse or obtain a copy of the recommendations of the examining officer and the officer in charge, as contemplated by paragraph c of subd. 4 of Rule 22 of the Rules relating to arrest and deportation on warrant, promulgated by the Department of Commerce and Labor, Bureau of Immigration and Naturalization, on November 15, 1911, First Edition; that such practice is not consistent with the eternal principles of right and justice; that this petitioner or his counsel had no opportunity to know what the recommendations of the Immigration officials were and upon what reasons said recommendations, being adverse, were based, had no opportunity to take exceptions thereto or to correct any errors therein, or to combat or refute the same or to protect the rights of this petitioner before the Secretary of Labor when he received said adverse recommendations and considered and acted upon the same and ordered this petitioner deported.

(VI)

That your petitioner further represents that said Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, was not intended, and does not, in law, operate retroactively and is not and cannot be an *ex post facto* law, and that much of the statements based on information and belief, and *ex parte* and hearsay statements, matters of opinion, conjecture and surmise, private reports and other matter of an incompetent, immaterial and irrelevant character, not permitted [8] to be admitted in the courts of justice of the United States, State or Fed-

eral, introduced against your petitioner, related to alleged acts alleged to have been committed by this petitioner previous to the amendatory act of March 26, 1910, and related to matters alleged to have taken place in the year 1909.

(VII)

That said Secretary of Labor and the Immigration officials in the various particulars above set forth, acted arbitrarily and that their proceedings were and are manifestly unfair, and that the action of such executive officers was and is such as to prevent a fair investigation, and that there was and is a manifest abuse of the discretion committed to such executive officers by statute,

(VIII)

This petitioner avers that he has herewith appended to this petition and made a part hereof, a full, true and correct copy of all of the proceedings before the Immigration officials, so far as the same have been disclosed to this petitioner or to his counsel, and of which he is, or his counsel are, aware, and the respondent has in his possession the originals thereof.

(IX)

That your petitioner has exhausted all legal or other remedies specified in the Acts of Congress relating to the subject matter.

(X)

That your petitioner is not an alien or other immigrant; and that he has acquired and now holds a fixed, permanent resident and domicile in the city of Sacramento, State and Northern District of California, and has enjoyed and maintained [9] his residence

and domicile in the United States for many years continuously last past without molestation or interference until the time of your petitioner's arrest and threatened deportation as aforesaid.

(XI)

That your petitioner is now detained, imprisoned, confined and restrained of his liberty and is imprisoned at said Angel Island, California, and is held and imprisoned by the order and direction of the Secretary of Labor and is in the custody of the Commissioner of Immigration at the port of San Francisco, California, who claims the right to deport this petitioner under and by virtue of the pretended warrant of deportation hereinabove referred to.

That said Commissioner of Immigration threatens to take, carry away and deport this petitioner to some foreign country forthwith, and will so deport this petitioner unless stayed by the writ of this Court or the order and direction of this Court.

WHEREFORE your petitioner prays that a writ of habeas corpus issue out of this Honorable Court, and that he be brought before this Court then and there to inquire into the cause of his said imprisonment and threatened deportation; that, in the meantime, all proceedings against him be stayed, and that he be not taken without the jurisdiction of this Court during the pendency of these proceedings and that your petitioner be admitted to bail in such sum as to this Court may seem meet and proper; and that said Immigration officers be required to make a full and complete return showing the cause of the detention of your petitioner; and, finally, that your peti-

tioner be restored to his liberty and permitted to
[10] go hence without day.

HARRY KATZ,
Petitioner.

State of California,
City and County of San Francisco,
Northern District of California,—ss.

Harry Katz, being first duly sworn, deposes and says: That he has read the foregoing petition for a writ of habeas corpus and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are stated on information and belief, and, as to those matters, that he believes them to be true.

HARRY KATZ,

Subscribed and sworn to before me this 16th day of December, 1914.

[Seal] MARTIN ARONSOHN,
Notary Public in and for the City and County of San Francisco, State of California.

(Here Follows Exhibits "A" to "BBB.")

[Endorsed]: Filed Dec. 16, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [11]

*In the District Court of the United States, Northern
District of California, First Division.*

In the Matter of HARRY KATZ, on Habeas Corpus.

Order to Show Cause.

Upon reading the petition on file herein and good cause appearing therefor, it is ordered that the respondent, the Commissioner of Immigration at the

port of San Francisco, California, appear in this court on the 24 day of December, 1914, at 10 o'clock A. M., and then and there show cause, if any, why a writ of habeas corpus should not issue as prayed for and that during the pendency of these proceedings the petitioner be not removed from the jurisdiction of this Court, and that a copy of this order and of said petition be served upon respondent forthwith and that the petitioner be admitted to bail in the sum of one thousand dollars.

M. T. DOOLING,
U. S. District Judge.

Dated December 16, 1914.

[Endorsed]: Filed Dec. 16, 1914. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [12]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

In the Matter of HARRY KATZ, on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Samuel W. Backus, Commissioner of Immigration at the port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled matter and for grounds of demurrer alleges:

I.

That said petition does not state facts sufficient to entitle the petitioner to the issuance of a writ of habeas corpus or any relief thereon.

II.

That said petition is insufficient in that the statements in the petition relative to the record of the testimony taken on the trial of the applicant, are statements of conclusions of law.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,

United States Attorney.

WALTER E. HETTMAN,

Asst. United States Attorney,
Attorneys for Respondent.

Service admitted this 5th day of January, 1915.

MARSHALL B. WOODWORTH,

Atty. for Pet.

[Endorsed]: Filed Jan. 5, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [13]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,752.

In the Matter of HARRY KATZ, on Habeas Corpus.
**Opinion and Order Overruling Demurrer and Direct-
ing Writ of Issue.**

ON DEMURRER TO PETITION FOR A WRIT
OF HABEAS CORPUS.

MARSHALL B. WOODWORTH, and S.
LUKE HOWE, Attorneys for Petitioner.

JOHN W. PRESTON, United States Attorney
and CASPAR A. ORNBAUN, Assistant
United States Attorney, Attorneys for Re-
spondent.

The records here which accompany the petition shows no real evidence against the petitioner. The affidavits are upon information and belief, and express only the opinions of the affiants. It is true that in this State the reputation of a house as a house of ill-fame, may be shown, but I know of no rule, here or elsewhere, which permits the ownership or management of such a house to be thus proved. There should be in my opinion some fair substantial testimony upon which to base an order deporting from this country an alien who has lawfully entered it. The record here is too long to recite, but the closest scrutiny of it will not reveal in all the testimony taken, whether in the presence or absence of petitioner, any competent evidence, and by that I mean evidence other than pure hearsay and expressions of opinion, tending to support the finding that petitioner was either connected with the management of a house of prostitution or has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes. It may be true that the presence [14] of petitioner in this country is displeasing to many worthy people, but he may not be deported for that reason. He can only be deported after a fair hearing, and then only when the order deporting him finds support in something other than mere hearsay and opinion. The demurrer to the petition will be overruled, and a writ will issue returnable December 11th, 1915, at 10 o'clock A. M.

November 26th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Nov. 26, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,752.

In the Matter of HARRY KATZ, on Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to the Commissioner of Immigration, Port of San Francisco, Calif., Angel Island, Calif., GREETING:

YOU ARE HEREBY COMMANDED that you have the body of the said person by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable M. T. DOOLING, Judge of the District Court of the United States, for the Northern District of California, at the courtroom of said court, in the city and county of San Francisco, California, on the 11th day of December, A. D. 1915, at 10 o'clock A. M. to do and receive what shall then and there be considered in the premises.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS, the Honorable M. T. DOOLING, Judge of the said District Court, and the seal thereof

at San Francisco, in said District on the 26th day of November, A. D. 1915.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [16]

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Writ of Habeas Corpus on the therein-named Commissioner of Immigration at the port of San Francisco, Cal., by handing to and leaving a true and correct copy thereof with Edward White the above named Commissioner personally at San Francisco, Cal. in said District on the 6th day of December, A. D., 1915.

J. B. HOLOHAN,
U. S. Marshal.
By Thos. F. Mulhall,
Deputy.

[Endorsed]: Filed Dec. 9, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [17]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No 15,752.

In the Matter of HARRY KATZ, on Habeas Corpus.

Return to Petition for Writ of Habeas Corpus

Now comes Edward White, Commissioner of Im-

migration at the Port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the Order to Show Cause, issued by the said Court on the petition of Harry Katz, for a writ of habeas corpus, and to said petition, admits, denies and alleges as follows:

ADMITS that the petitioner, Harry Katz, is a resident of the city of Sacramento, State and Northern District of California, and has been a regularly domiciled resident of said State and Northern District of California, continuously last passed for the period of fourteen years.

ADMITS that he first arrived and lawfully entered the United States at the Port of New York in the year 1901, and has ever since continuously resided in the United States, with the exception of a temporary brief trip to England, but DENIES that up to and at the time of his detention, restraint and imprisonment, hereinafter complained of, that he was lawfully and regularly domiciled and living in the city of Sacramento, State and Northern District of California, and had and has no home, abode, or domicile elsewhere.

ADMITS that petitioner plied his trade as barber when [18] he arrived in the United States and afterwards became, and now is a chiropodist; ADMITS that he has offices in Stockton and Sacramento.

As to the allegation on paragraph 11 of page 2 of said petition, to wit, that he is a hard working, industrious and frugal man, who has saved up his money, and that he had made some small investments in buying and selling real estate, respondent has no infor-

mation or belief upon the subject sufficient to enable him to answer said allegation, and basing his answer upon such lack of information, denies the same.

DENIES that said petitioner is unlawfully imprisoned, restrained, confined and detained, or is unlawfully imprisoned, or restrained, or confined, or detained of his liberty by the Commissioner of Immigration, or otherwise, at the port of San Francisco, or elsewhere, but ADMITS that said petitioner is about to be taken from his domicile in the State of California and in the United States of America, and sent against his will to the Kingdom of Great Britain, and in this connection respondent alleges that the said Kingdom of Great Britain is the country from which said petitioner came at the time of his entering the United States of America.

ADMITS that the said Commissioner of Immigration claims to have the legal right and is about to deport said petitioner from the State of California and from the United States by virtue of and under the authority of a warrant of deportation directing the said Commissioner to deport said petitioner.

ADMITS that said Commissioner of Immigration claims that said warrant of deportation was issued by the Secretary of Labor under and by virtue of the laws of the United States made and promulgated to regulate and provide for the deportation of certain [19] alien persons, to wit, under the authority of the Immigration Act of February 20, 1907 (34 Stats. 898), as amended by the Act of March 26, 1910 (36 Stats. 263) and in this connection respondent alleges that said warrant of deportation was issued by the

said Secretary of Labor under and by virtue of the laws of the United States of America.

DENIES that the said Secretary of Labor and the said Commissioner of Immigration, or either of them, had or that they now have, no jurisdiction or lawful authority to deport or banish the said petitioner from the United States.

DENIES that petitioner did not have any legal hearing upon the charges made against him in the warrant of arrest issued against him, dated March 18, 1914.

DENIES that said petitioner is not amenable to any of the provisions of the Act of February 20, 1907, as amended by the Act of March 26, 1910; DENIES that there was and is no sufficient legal, or competent, or any evidence showing that said petitioner is unlawfully within the United States, and in this connection respondent alleges that said warrant of deportation of said petitioner is based upon evidence that said petitioner has been found receiving, sharing in, and deriving benefit from the earnings of a prostitute, or prostitutes, and connected with the management of a house of prostitution.

DENIES that there was and is no sufficient, or any, warrant of arrest, authorizing the Commissioner of Immigration at Angel Island, California, or any of his subordinates to arrest petitioner and entertain or proceed to entertain hearing or proceedings upon any charge or charges against petitioner arising from acts committed by said petitioner and bringing him within the provisions of the Act of February 20, 1907, as amended by the Act of March 26, 1910. [20]

DENIES that there was no sufficient, or any, warrant of deportation authorizing the Commissioner of Immigration at Angel Island, California, to deport this petitioner to a foreign country or elsewhere, or to hold this petitioner in detention and imprisonment for any purpose whatsoever.

DENIES that petitioner was and is ordered deported without any due process of law or proof of any kind or character, proving or tending to prove said alleged charged made against him.

DENIES that petitioner, either before or after, the warrant of deportation was issued against him, was denied by the said Secretary of Labor and by the Immigration officers, or by the Secretary of Labor, or by the Immigration officers, or by any one, or at all, at the Port of San Francisco, or elsewhere, a full and fair hearing, as provided by law.

DENIES that petitioner was subjected to private and secret investigations and examinations, or private or secret investigations or examinations, without his consent; DENIES that petitioner was compelled to be a witness against himself, and in this connection respondent alleges that upon the arrest of said petitioner, he was taken before the Immigration officers at Angel Island Station, San Francisco, California, and there given a full, fair and impartial hearing and accorded all of the privileges and rights given to him by law; that all of the statements made at the said examination or any other examination had of said petitioner pending his investigation upon the charges referred to in said warrant of arrest have been free and voluntary.

DENIES that the evidence presented, or attempted to be presented, and introduced against petitioner, and upon which said warrant of deportation is based, consists of statements based on information and belief contained in affidavits, consists further of [21] *ex parte* and hearsay statements, matters of opinion, conjecture, and surmise, private reports and other matters of an incompetent, immaterial and irrelevant character and wholly insufficient to support any of the charges upon which it is sought to deport said petitioner, and in this connection respondent alleges that while some of the evidence presented and introduced against petitioner consists of statements based upon information and belief, other affidavits are positive in character; ADMITS that some of the evidence introduced against petitioner, and upon which said warrant of deportation is based, consists of *ex parte* and hearsay statements, matters of opinion, conjecture and surmise, and private reports, but in this connection respondent alleges that the matters contained in said affidavits were wholly justified from the surrounding circumstances and the information which has come to the knowledge of those who made said affidavits.

DENIES that the said Immigration officers acted in bad faith and arbitrarily and illegally, or in bad faith, or arbitrarily or illegally, in said pretended trial or hearings, or in any trial or hearing, or hearings, in not producing any witnesses or evidence to support the truth of the charges alleged against this petitioner, and in this connection respondent alleges that ample and sufficient evidence was pro-

duced to support the truth of the charges against said petitioner.

DENIES that said Immigration officers acted in bad faith and arbitrarily and illegally, or in bad faith, or arbitrarily or illegally, in said pretended trial, in acting wholly, entirely, and solely upon statements based on information and belief, or based on information or belief, and contained in affidavits, and in this connection respondent alleges that some of the affidavits were positive in character and not based upon information and belief. [22]

DENIES that said Immigration officers acted in bad faith and arbitrarily and illegally, or in bad faith, or arbitrarily, or illegally, in not giving said petitioner the opportunity to cross-examine the persons making said affidavits, or in not warning said petitioner what the contents of said affidavits would be, and in this connection respondent alleges that said petitioner was given an opportunity in every instance to examine the contents of each and every affidavit filed in the above-entitled matter and to reply to the same, and interpose any defense which the said petitioner deemed advisable.

Respondent further alleges that said petitioner was never denied the right to be represented by counsel in any of the hearings in the above-entitled matter, and that said petitioner was represented by counsel who had an opportunity to submit any and all evidence which he desired to submit in behalf of said petitioner before any determination was made of the rights of said petitioner in the above-entitled matter.

DENIES that the said pretended hearing, or

hearing, before said Commissioner of Immigration, did not and does not constitute a full and fair, or full or fair, hearing within the meaning of the law, in that said petitioner was not permitted, nor was any of his counsel, to see or peruse, or obtain, a copy of the recommendations of the examining officer and the officers in charge.

DENIES that it was ever contemplated by paragraphs 1 of subdivision 4 of Rule II of the New Rules relating to arrest and deportation on warrant promulgated by the Department of Commerce and Labor, Bureau of Immigration and Naturalization, on November 15, 1911, first edition, that said petitioner should have access to, or be given knowledge of the recommendations of the examining [23] officer and officers in charge of the said Immigration work, and in this connection respondent alleges that all of the evidence of every kind and nature submitted in the above-entitled matter, was examined by the petitioner or his counsel before any final determination of the rights of said petitioner were made by the said Immigration officers and that said petitioner was given an opportunity to reply to any and all evidence submitted in behalf of said Immigration officers, and to submit any and all evidence in his behalf that the petitioner desired to submit;

DENIES that the refusal on the part of the said Immigration officers to permit the said petitioner to see or peruse or obtain a copy of the recommendations of the examining officer and the officers in charge is not consistent with the eternal principles of right and justice.

DENIES that said petitioner, or his counsel, or either of them, had no opportunity to know what the recommendations of the Immigration officials were and upon what reasons said recommendations being adverse were based, and in this connection respondent alleges that before the said recommendations of the said Immigration officials were made petitioner and his counsel were given the opportunity to examine, and did examine the affidavits upon which said recommendations were made, and that said petitioner and his counsel had every opportunity after examining said affidavits and other evidence submitted on behalf of the said Immigration officers to combat and refuse, the same and to protect the rights of said petitioner by submitting any defense or other evidence that the said petitioner deemed advisable.

DENIES that the said Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, was not intended and does not in law operate retroactively. [24]

DENIES that the said Secretary of Labor and Immigration officials in various particulars above set forth, or in any particulars, acted arbitrarily, and that other proceedings were and are manifestly unfair, or unfair, in any particular, and further DENIES that the said action of such executive officers was and is such as to prevent a fair investigation; DENIES that there was and is, or was or is a manifest, or any abuse of discretion committed to such executive officers by statutes or otherwise.

DENIES that said petitioner is not an alien or other immigrant, and DENIES that said petitioner

has enjoyed and maintained, or enjoyed or maintained his residence and domicile, or residence or domicile, in the United States for many years continuously last past without molestation or interference.

As a further, separate and distinct answer and defense to the petition on file herein, respondent alleges that since the proceedings taken to effect the deportation of said petitioner, certain hearings have been conducted and evidence submitted, both by said petitioner and the said Immigration authorities and officers; that said hearings were conducted and the testimony and other evidence taken by the Immigration officials acting for and on behalf of the Government of the United States and that all of the evidence and other testimony given or taken at said hearings, or which has been considered in any manner in determining whether or not the said petitioner should be deported, has been recorded by said Immigration officials in a record known as the "Immigration Record, in the Matter of Harry Katz on Habeas Corpus," and numbered 53,770; that said testimony and other evidence and all of the exhibits that were considered with the said record are by reference incorporated into and made a part of this return and the same are filed herewith. [25]

WHEREFORE, respondent prays that said petition for a writ of habeas corpus be denied and that the Order to Show Cause be discharged and that said alien be remanded to the custody of the respondent for deportation, as provided for in said warrant of

deportation heretofore issued by the Secretary of Labor of the United States, and for such other and further relief as to this Court seems just and equitable.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney,

Attorneys for Respondent.

United States of America,

Northern District of California,

City and County of San Francisco,—ss:

Charles D. Mayer, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the port of San Francisco, and has been specially directed to appear for and to represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within Return to Petition for Writ of Habeas Corpus and knows the contents thereof; that it is impossible for the said Edward White to appear in person or to give his attention to said matter; that of affiant's own knowledge the matters set forth in the Return to the Petition for Writ of Habeas Corpus are true, excepting those matters which are stated on information and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 8th day of January, 1916.

[Seal]

T. L. BALDWIN,
Deputy Clerk U. S. District Court, Northern Dis-
trict of California.

[Endorsed]: Filed Jan. 8, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [26]

*In the District Court of the United States, Northern
District of California, First Division.*

No. 15,752.

In the Matter of HARRY KATZ, on Habeas Corpus.
**Traverse to Return to Order to Show Cause Why
Writ of Habeas Corpus Should not Issue.**

Now comes Harry Katz, petitioner for a writ of habeas corpus in the above-entitled matter, through his attorney, Marshall B. Woodworth, and, for answer or traverse to the Return to the Order to show cause why writ of habeas corpus should not issue, filed herein on January 8, 1916, by the Commissioner of Immigration at Angel Island, California, states as follows:

Said petitioner reaffirms, reasserts, and realleges all of the matters, things and facts by him alleged in his said petition for a writ of habeas corpus, and, in this connection, he refers to the said petition on file and hereby makes the allegations of said petition a part of this answer or traverse.

And, further answering said Return and what purports to be a full and complete transcript of all of the

proceedings had before the Immigration Department in a record known as the "Immigration Record, in the Matter of Harry Katz on Habeas Corpus," and numbered 53,770, and appended to and made a part of said Return, your petitioner states that if it should appear that said record above referred to contains any further, additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the various officers of the Immigration Service, and any other papers, memoranda or data, other than those contained and set out in the [27] various exhibits appended to the petition for a writ of habeas corpus then that said further, additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the various officers of the Immigration service, and any other papers, memoranda or data, were never disclosed or exhibited until up to the present time to said petitioner or to his attorneys or any of them, nor was said petitioner or any of his attorneys ever informed or appraised, either directly or indirectly, of the existence, nature or contents of any such further, additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the various officers of the immigration service, and any other papers, memoranda or data, other than those contained and set out in the various exhibits attached to the petition for a writ of habeas corpus, and said petitioner did not have, nor any of his attorneys, any opportunity to defend against such further, additional, different or other alleged testimony or al-

leged evidence, documents, reports, private correspondence between the various officers of the Immigration service, or any other papers, memoranda or data, and to refute and to present proofs against the same, and, in this respect, your petitioner through his said attorney, avers that said hearing or pretended hearing or trial was unfair and in violation of law and of the constitutional rights and guaranties accorded to this petitioner, in consideration of which he is entitled to his discharge by the writ of habeas corpus.

WHEREFORE, your petitioner prays that said Return be deemed insufficient in law to justify or authorize the further detention or imprisonment of your petitioner and that he may be discharged [28] and restored to his liberty and go hence without day.

MARSHALL B. WOODWORTH,
Attorney for Harry Katz, Petitioner.

State and Northern District of California,
City and County of San Francisco.

Marshall B. Woodworth, being first duly sworn, says that he has read the foregoing traverse by him subscribed and knows the contents thereof and that the matters and things therein set forth are true in substance and in fact.

MARSHALL B. WOODWORTH.

Subscribed and sworn to before me this 10th day of January, 1916.

[Seal] MARTIN ARONSOHN,
Notary Public in and for the City and County of San Francisco, State of California.

Service admitted by receipt of copy this Jan. 10, 1916.

JNO. W. PRESTON,

U. S. Atty.,

Atty. for Respondent.

[Endorsed]: Filed Jan. 10, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [29]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,752.

In the Matter of HARRY KATZ, on Habeas
Corpus.

Order Discharging Petitioner.

MARSHALL B. WOODWORTH, Esq., and
S. L. HOWE, Esq., Attorneys for Peti-
tioner.

JOHN W. PRESTON, Esq., United States At-
torney and CASPER A. ORNBAUN, Esq.,
Assistant United States Attorney, Attor-
neys for Respondent.

The return to the writ of habeas corpus herein presents no question either of law or of fact that was not urged and considered upon the demurrer to the petition. I am satisfied with the conclusions reached at that time, and it is therefore ordered that petitioner be discharged.

January 13th, 1916.

M. T. DOOLING,

Judge.

[Endorsed]: Jan. 13, 1916. W. B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk. [30]

*In the District Court of the United States, Northern
District of California.*

No. 15,752.

In the Matter of HARRY KATZ, on Habeas
Corpus.

Order of Discharge.

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court now here ORDERED, that the said named person in whose behalf the Writ of Habeas Corpus was sued out, is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby discharged from the custody from which he has been produced, and that he go hence without day.

Entered this 13 day of January, 1916.

[Seal]

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Endorsed]: Filed Jan. 13, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [31]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,752.

In the Matter of HARRY KATZ, on Habeas Corpus.

Petition for Appeal.

To the Honorable M. T. DOOLING, Judge of the
District Court of the United States, for the
Northern District of California:

Edward White, as Commissioner of Immigration
at the Port of San Francisco, appellant herein, feel-
ing aggrieved by the order and judgment made and
entered in the above-entitled cause, on the 13th day
of January, A. D. 1916, discharging Harry Katz
from the custody of said appellant, does hereby ap-
peal from said order and judgment to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, for the reasons set forth in the Assignment of
Errors filed herewith.

WHEREFORE, petitioner prays that his appeal
be allowed and that citation be issued as provided by
law and that a transcript of the record, proceedings
and documents, and all of the papers upon which
said judgment and order were based, duly authenti-
cated, be sent to the United States Circuit Court of
Appeals, for the Ninth Circuit, under the rules of
said Court and in accordance with the law in such
cases made and provided.

Dated this 28th day of June, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

[Endorsed]: Filed June 28, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [32]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,752.

In the Matter of HARRY KATZ, on Habeas Corpus.

Assignment of Errors.

Now comes Edward White, Commissioner of Immigration at the Port of San Francisco, respondent in the above-entitled cause and appellant in the appeal to the United States Circuit Court of Appeals, taken herein, by his attorneys, Jno. W. Preston, United States Attorney, and Casper A. Ornbaun, Assistant United States Attorney, and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment made by this Honorable Court on the 13th day of January, A. D. 1916.

I.

That the Court erred in granting the writ of habeas corpus and discharging the alien, Harry Katz, from

the custody of Edward White, Commissioner of Immigration;

II.

That the Court erred in holding that it had jurisdiction to issue the writ of habeas corpus in the above-entitled cause, as prayed for in the petition of the said Harry Katz for a writ of habeas corpus;

III.

That the Court erred in holding that the allegations contained in said petition for a writ of habeas corpus were [33] sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in finding that the evidence upon which the Secretary of Labor issued the warrant of deportation for the said Harry Katz was insufficient in character.

V.

That the Court erred in inquiring into the character and sufficiency of the evidence considered by the said Secretary of Labor in issuing the said warrant of deportation.

VI.

That the Court erred in holding that pure hearsay evidence and expressions of opinions tending to support the finding that the said Harry Katz had been found receiving, sharing in, or deriving benefits from the earnings of a prostitute, or prostitutes, was incompetent evidence and that it was error on the part of the said Secretary of Labor to base his order of deportation upon such evidence.

VII.

That the Court erred in holding that the said Harry Katz was illegally restrained of his liberty by said Edward White, Commissioner of Immigration, and that the evidence taken and considered in the hearing of said case under the Immigration Act of February 20, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913, was insufficient to justify said respondent, as Commissioner of Immigration, to detain or deport the said Harry Katz.

VIII.

That the Court erred in discharging the said alien from the custody of said Edward White, Commissioner of Immigration. [34]

WHEREFORE, appellant prays that the said order and judgment of the United States District Court, in and for the Northern District of California, made and entered herein, in the office of the Clerk of said Court on the 13th day of January, A. D. 1916, setting aside the return to the petition for a writ of habeas corpus and discharging the said Harry Katz from the custody of Edward White Commissioner of Immigration, and appellant herein, be reversed, and that the said Harry Katz be remanded to the custody of the said Commissioner of Immigration.

Dated this 28th day of June, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

[Endorsed]: Filed June 28, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [35]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,752.

In the Matter of HARRY KATZ, on Habeas Corpus.

Order Allowing Appeal.

On motion of Jno. W. Preston, United States Attorney, and Casper A. Ornbaun, Assistant United States Attorney, attorneys for appellant in the above-entitled cause,

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from an order and judgment heretofore made and entered herein be, and the same is hereby allowed, and that a certified transcript of the records, testimony, exhibits and stipulations, and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in the manner and time prescribed by law.

M. T. DOOLING,

Judge of the District Court.

Dated this 28th day of June, A. D. 1916.

[Endorsed]: Filed June 28, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [36]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,752.

In the Matter of HARRY KATZ, on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court and to
Harry Katz, and to Marshall B. Woodworth,
Esq., His Attorney.

You and each of you will please take notice that
Edward White, Commissioner of Immigration at the
Port of San Francisco, appellant herein, hereby ap-
peals to the United States Circuit Court of Appeals
for the Ninth Circuit, from an order and judgment
made and entered herein on the 13th day of January,
A. D. 1916, setting aside the return to the petition for
a writ of habeas corpus, and discharging the said
Harry Katz from the custody of said Edward White,
Commissioner of Immigration at the port of San
Francisco, appellant herein.

Dated this 28th day of June, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

[Endorsed]: Filed June 28, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [37]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,752.

In the Matter of HARRY KATZ, on Habeas Corpus.

Order for Transmission of Original Exhibits.

It appearing to the Court that it is both necessary and proper that the original record of the Bureau of Immigration which was filed in the above-entitled court as Respondent's Exhibit "A," and which was made a part of respondent's Return to Petition for Habeas Corpus in said above-entitled cause, should be inspected in the United States Circuit Court of Appeals for the Ninth Circuit in determining the appeal of said cause,

IT IS THEREFORE ORDERED that the said original record be transferred by the clerk of the above-entitled court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be retained by the said clerk until the appeal in the above-entitled cause is properly disposed of, at which time the said original record is to be returned to the clerk of the above-entitled court.

WM. H. HUNT,
Judge.

December 27, 1916.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [38]

**Certificate of Clerk U. S. District Court, to
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 38 pages, numbered from 1 to 38, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the Matter of Harry Katz, on Habeas Corpus, No. 15,752, as the same now remain on file and of record in this office; said Transcript having been prepared pursuant to and in accordance with "Praecipe" (copy of which is embodied in this transcript), and the instructions of the U. S. Attorney.

I further certify that the cost for preparing and certifying the foregoing Transcript on Appeal is the sum of nineteen dollars and sixty cents (\$19.60).

Annexed hereto is the Original Citation on Appeal, issued herein, page 40.

IN WITNESS WHEREOF, I have heerunto set my hand and affixed the seal of said District Court, this 6th day of January, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By F. L. Baldwin,

Deputy Clerk. [39]

Citation on Appeal—Original.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Harry Katz,
and Marshall B. Woodworth, Esq., and S. L.
Howe, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern Division of the Northern District of California, wherein Samuel W. Backus, Commissioner of Immigration, Port of San Francisco, and who is now succeeded by Edward White as Commissioner of immigration at the port of San Francisco, State of California is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, this 5th day of January, A. D. 1917.

M. T. DOOLING,

United States District Judge. [40]

[Endorsed]: No. 15,752. United States District Court for the — District of —. Edward White,

Appellant, vs. Harry Katz. Citation on Appeal. Filed Jan. 5, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 2917. United States Circuit Court of Appeals for the Ninth Circuit. Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco, who is now Succeeded by Edward White, as Commissioner of Immigration at Said Port, Appellant, vs. Harry Katz, Appellee. Transcript of the Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed January 6, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2917

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco, Who is Now Succeeded by EDWARD WHITE, as Commissioner of said Port,
Appellant,

VS.

HARRY KATZ,
Appellee.

GOVERNMENT'S BRIEF

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellant.

Filed this.....day of February, 1917. FEB 28 1917

FRANK D. MONCKTON, Clerk,
F. D. Monckton

By....., Deputy Clerk.

No. 2917.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco, Who is Now Succeeded by EDWARD WHITE, as Commissioner of said Port,	}	<i>Appellant,</i>
vs.		
HARRY KATZ,		<i>Appellee.</i>

GOVERNMENT'S BRIEF

STATEMENT OF THE CASE.

While this appeal is concerned only with one Harry Katz, alias Dr. Harry H. Katz, the records to be considered in determining this appeal make frequent mention of the "Katz Brothers" and one "Joseph Katz", the latter having been ordered deported by the Secretary of Labor and is now prosecuting his appeal in this Court, case Number 2812.

The warrant authorizing the arrest of appellee (p. 12 Immigration record) charges that the said appellee "has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March

26, 1910, for the following among other reasons; that the said alien is unlawfully within the United States, in that he has been found connected with the management of a house of prostitution; and that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes.”

An investigation which led up to the charge above stated was initiated by a committee of fifteen women members of the Parent-Teacher Association of Colfax, California, and the Secretary of this Association has given such a clear review of the situation on pages 75 and 76 of the Immigration record that the government deems it advisable to incorporate said review herein, as a part of its statement of facts. Said review reads as follows:

“Sometime during the year 1908 (?) one Abbott who distributed cards on the passenger platform at Colfax for the Winchester (?) hotel, San Francisco, and who also was agent for the Sacramento Bee, owned a small house behind a stable situated about opposite to where the passenger depot now stands. Abbott lived with several women at different times, and it became known that these women received other men. Abbott sold his property to Harry Katz who added some rooms and secured more women. Soon after Katz bought, the Railroad Company needed the property for its new line and so secured it from Katz. Katz then bought a house and lot from Frank Schillinger near and diagonally from the M. E. Church.

This house soon had as inmates several prostitutes. The house became notorious, and was a great nuisance to the immediate neighbors, one of whom, Charles W. Hanson, complained to Justice J. Kuenzley. Suit was instituted against Katz, but it was dismissed because of failure to secure a jury. Hanson then presented a petition, numerously signed, to the County Supervisors of Placer County, who ordered the District Attorney to proceed against Katz. The high fence which partially hid the house was removed and also the sign "Dressmaking", and the sign "Palace Rooms" was substituted. Before the District Attorney had succeeded in removing the house, Colfax had incorporated and so taken the authority out of the hands of the Supervisors, and it was vested in the Trustees of the City of Colfax. Hanson was unable to secure from the Trustees any assistance in abating the nuisance and finally dropped the matter as he was assured that Katz had promised to vacate as soon as he could procure land on which to build another house. This he did within the year 1911. The new location was on the County road at the northern entrance to town and has so remained to the present time. The madam at each location was one and the same person and known by the name of Nellie White and never known by any other name. This establishment at the north entrance of town, belonging to Harry Katz and his brother, Joe Katz, presided over by Nellie White, was known to all the community as a house of prostitution and was always referred to in such terms as are used in speaking of houses of prostitution.

During the month of July, 1913, a child of about ten was noticed about the premises of the aforesaid house and also was seen several times in company with Nellie White. On Hallowe'en night, 1913, it was understood on good authority that a number of grammar school boys were invited to a banquet at the aforesaid house. These and other occurrences aroused the members of the Parent-Teacher Association to take action to rid the town of this pernicious and criminal business. Fifteen women members of the Parent-Teacher Association of Colfax organized under the name of the Committee of Fifteen and commenced legal proceedings. During the investigations of this committee it was discovered that neither of the Katz Brothers were citizens of the United States, and that they were therefore subject to deportation as undesirable immigrants because of their connection with houses of prostitution.

The Immigration Service was notified and Mr. Griffiths came to Colfax to investigate the matter. The inmates of the "Redlight" district were brought into court and examined by Mr. Griffiths. After the examination warrants of arrest were served on Nellie White and Roma Burdell for keeping and maintaining houses of ill-fame. They were released on bail. It was the purpose of Mr. Griffiths to leave Colfax for San Francisco the following morning. The alien, Joe Katz, and the suspected alien, Nellie White, both promised to accompany him, but they failed to keep their promise and escaped. After remaining in hiding for two weeks more or less, Joe Katz surrendered

to the Federal officers, but Nellie White has thus far not been located and is supposed to be kept in hiding by the Katz Brothers.

At the rear of the Katz establishment at the west entrance to town, and about ten or twelve feet away, Joe Katz had erected a small outdoor sleeping room which he occupied, and for him to say that he knew nothing about the character of the house or the business of its occupants is absolutely absurd. He and his brother Harry also know that they were obliged to remove Nellie White to another locality because of the complaint filed in the Justice's court by the people of the neighborhood. It is also absurd to deny knowledge of the character of the inmates of their houses as it would be impossible for any one to be in or about Colfax for even a short space of time without knowing the character of these places.

The above facts were collected by the Committee of Fifteen—composed of women who have undertaken to rid their community of the houses of prostitution—and it has authorized its Secretary to sign the same before a Notary Public.

(Signed) L. F. S. PEERS

Secretary of the Committee of Fifteen.

State of California }
County of Placer } ss

On this 29th day of May in the year one thousand nine hundred and fourteen, before me, Morris Lobner, a notary public in and for the County of Placer, personally appeared L. F. S. Peers known to me to be the person

whose name she subscribed to the within instrument, and who duly acknowledged to me that she executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in the County of Placer the day and year in this certificate first above written.

(Signed) MORRIS LOBNER,
Notary Public, in and for the County of
Placer, State of California."

The above review was considered a part of the evidence by the Secretary of Labor in its final decision of this case, as were all of the other affidavits and writings of every character which are attached to the Immigration record on file herein and to be considered in determining this appeal.

ASSIGNMENT OF ERRORS.

I.

That the Court erred in granting the writ of habeas corpus and discharging the alien, Harry Katz, from the custody of Edward White, Commissioner of Immigration;

II.

That the Court erred in holding that it had jurisdiction to issue the writ of habeas corpus in the above-entitled cause, as prayed for in the petition of the said Harry Katz for a writ of habeas corpus.

III.

That the Court erred in holding that the allegations contained in said petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in finding that the evidence upon which the Secretary of Labor issued the warrant of deportation for the said Harry Katz was insufficient in character.

V.

That the Court erred in inquiring into the character and sufficiency of the evidence considered by the said Secretary of Labor in issuing the said warrant of deportation.

VI.

That the Court erred in holding that pure hearsay evidence and expressions of opinions tending to support the finding that the said Harry Katz had been found receiving, sharing in, or deriving benefits from the earnings of a prostitute, or prostitutes, was incompetent evidence and that it was error on the part of the said Secretary of Labor to base his order of deportation upon such evidence.

VII.

That the Court erred in holding that the said Harry Katz was illegally restrained of his liberty by said Edward White, Commissioner of Immigra-

tion, and that the evidence taken and considered in the hearing of said case under the Immigration Act of February 20, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913, was insufficient to justify said respondent, as Commissioner of Immigration, to detain or deport the said Harry Katz.

VIII.

That the Court erred in discharging the said alien from the custody of said Edward White, Commissioner of Immigration.

ARGUMENT.

While there are many errors assigned, there is but one material point to be determined in this case and that is, whether or not the Secretary of Labor and his subordinates gave the appellee a fair hearing in considering the character of evidence introduced herein. The government desires to have it understood from the beginning that in determining the questions which this Court is now confronted with, the lower Court had before it the original record of the Bureau of Immigration, which is on file herein, and that this record was made a part of the government's return and is therefore properly before this Court to be considered by it in determining this appeal.

The lower Court in determining the question which is now before this Court rendered the following opinion:

“The records here which accompany the petition shows no real evidence against the petitioner. The affidavits are upon information and belief, and express only the opinions of the affiants. It is true that in this State the reputation of a house as a house of ill-fame, may be shown, but I know of no rule, here or elsewhere, which permits the ownership or management of such a house to be thus proved. There should be in my opinion some fair substantial testimony upon which to base an order deporting from this country an alien who has lawfully entered it. The record here is too long to recite, but the closest scrutiny of it will not reveal in all the testimony taken, whether in the presence or absence of petitioner, any competent evidence, and by that I mean evidence other than pure hearsay and expressions of opinion, tending to support the finding that petitioner was either connected with the management of a house of prostitution or has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes. It may be true that the presence of petitioner in this country is displeasing to many worthy people, but he may not be deported for that reason. He can only be deported after a fair hearing, and then only when the order deporting him finds support in something other than mere hearsay and opinion. The demurrer to the petition will be overruled, and a writ will issue returnable December 11th, 1915, at 10 o'clock A. M.

M. T. DOOLING,
Judge.”

November 26th, 1915.

From the foregoing opinion it can readily be seen that the lower Court based its opinion upon the character of evidence adduced by the government and it is now the object of this appeal to determine if possible just what character of evidence can be introduced and considered by the Secretary of Labor and his subordinates in an investigation of this character.

In order to assist this Court in determining the questions before it, the government deems it not only advisable, but necessary, to set forth the evidence introduced on behalf of the government before making any comments thereon.

AFFIDAVIT OF CHARLES H. HILL,

(pp. 77-78 Immigration record).

“State of New York, }
County of New York. } ss.

Charles H. Hill, being duly sworn, on oath deposes and says:

That he is a citizen of the United States, and resides at 601 West 160th Street, in the City of New York.

That from August nineteen hundred and nine to April nineteen hundred and ten, he lived in the town of Colfax, Placer County, California.

That the house in which he lived is located

on the Northwest corner of the P. McGinn property, in said town of Colfax.

That within a distance of about one hundred yards was located a house, known generally to the people of Colfax as a house of prostitution, and known generally as being conducted by one Harry Katz.

That the said house, known generally to the people of Colfax as a house of prostitution, was so situated that persons coming from the central and business section of the town, and entering or leaving said house, passed affiant's home.

That he spent many hours on the porch of his home in the day time, and slept on the porch at night.

That while the said house known generally to the people of Colfax and affiant, as a house of prostitution, had a sign reading "Dress-making" over the entrance, he saw many and different men enter and leave said house, during the day and night.

That while he slept on the porch of his home, he frequently overheard conversations of men going to and coming from said house, and that the substance of such conversations were of such a nature as to leave no doubt in the mind of the affiant, that the said house was a house of prostitution.

That he never saw more than three women at most, enter or leave said house.

That one of said women was known to him by sight as Nellie White.

That he saw said Nellie White enter and leave said house so often, and remain about about so much as to clearly indicate that she lived there.

That he saw a person known to him by sight as Harry Katz, enter and leave said house frequently, as much as several times a day, and on many days.

That he saw the said Harry Katz superintend alterations of said house.

That he saw the said Harry Katz enter the said house with parcels and leave without them, and in many and divers ways, shown more than an ordinary interest in it.

That in company with one Charles Hanson, a resident of Colfax, he complained to the District Attorney of Placer County, that said house was a disorderly house of ill repute, and a nuisance.

That to the best of his knowledge and belief the said Harry Katz conducted said house, known generally to the people of Colfax as a house of prostitution.

(Signed) CHARLES H. HILL,
General Manager, Lash's Bitters Company.
New York-Chicago-San Francisco.

Subscribed and sworn to before me this nineteenth day of May, nineteen hundred and fourteen.

(Signed) CHAS. H. VAN HAGEN,
N. Y. Co. No. 22, Notary Public."

AFFIDAVIT OF JACOB KUENZLY,
(pp. 98-99 Immigration record.)

“The People of the State of California,
Plff.

vs.

Henry H. Katz,

Defendant.

On July 2d, A. D. 1909, complaint filed, charging the defendant with the crime of misdemeanor, to wit: letting apartment for the purpose of prostitution, alleged to have been committed in the County of Placer, State of California, on or about July 2d, A. D. 1909, as fully set forth in the complaint herein:

Warrant of arrest issued July 2d, A. D. 1909.

The defendant was brought into Court on July 3rd, A. D. 1909.

The complaint was read to him, and he demanded Counsel before entering his plea; the Court set the time for pleading to July 7th, A. D. 1909, at 10 o'clock A. M., and admitted the defendant to bail in the sum of one hundred dollars. The defendant furnished bail, J. Reck and W. J. McCleary being the sureties.

On July 7th, A. D. 1909, the defendant appeared with his Counsel, George W. Hamilton, and demurred to the complaint herein, and the Court agreed to hear the argument on the demurrer at once.

The Court overruled the demurrer, and granted the defendant time until July 9th, A. D. 1909 at 10 o'clock A. M. to enter his plea.

On July 9th, A. D. 1909, at 10 o'clock A. M., the defendant appeared in Court with his Counsel, and entered his plea of not guilty. The Counsel for defendant then presented an affidavit for a change of venue; the Court granted time until July 12th, A. D. 1909 at 10 o'clock A. M., to file counter-affidavits.

On July 12th, A. D. 1909, at 10 o'clock A. M., the time set for the hearing on the motion for a change of venue, neither complainant nor the defendant appeared in Court, and the Court upon due consideration of the allegations in the affidavit of the defendant, and the circumstances in the case, overruled and denied the motion for a change of venue, and set the time for trial herein, to July 16th, A. D. 1909, at 10 o'clock A. M.

On July 12th, A. D. 1909, affidavit against change of venue filed.

On July 13th, A. D. 1909, writ of venire issued; also subpoena on behalf of the People. Subpoena on behalf of the People on July 14th, A. D. 1909.

On July 15th, A. D. 1909, additional subpoena issued on behalf of the People.

On July 15th, A. D. 1909, subpoena issued on behalf of the defendant.

On July 16th, A. D. 1909, the parties appeared in Court, the People being represented by District Attorney C. A. Tuttle. The Court proceeded to impanel the jury. The Counsel for defendant objected to the panel on the ground, that it had not been summoned according to law, as the Court had inserted the names of the jurors summoned in the venire.

The Dist. Atty. agreed to the objection taken, and the Court sustained the objection, and discharged the jurors, and adjourned until 1 o'clock P. M. on the same day.

At 1 o'clock P. M. the case was resumed. The new list of jurors summoned was called, and sworn, the number being twenty-three. The following were excused for cause: R. L. Wills, H. Spukler, N. T. Collins, E. Murray, Fred Schulze, N. E. Booth, S. K. Williams, and M. A. Jarrett.

The following were excused by the People: J. L. Bird, F. L. Austin, H. Pucci.

The following were excused by the defendant: Ed. Bigley, J. E. Watts, T. H. Hill, A. S. Winchester.

At this stage there were five jurors who had been passed by both parties, namely: A. J. Benjamin, A. J. Wall, L. Cortopassi, E. Campbell, and P. Nicholls—H. J. Snook and W. G. Cunningham had been called, but were not examined on account of the panel being exhausted, and not a sufficient number of citizens being present to make a complete panel.

The District Attorney then suggested that the case be continued to July 22d next, and that time was agreed to by the Attorney for the defendant; therefore it was ordered by the Court, that the case be continued to July 22d, A. D. 1909, at 10 o'clock A. M., and instructed the jurors sworn in, not to discuss this case with any person.

During the examination of the jurors, the Attorney for the defendant asked the prospect-

ive jurors, whether or not they understood, that the law in regard to the reputation or nature of the house in question in this case, by common repute, could not be applied in this case.

Objected to by the District Attorney.

Objection sustained by the Court. Excepted to by the Attorney for the defendant.

Writ of venire issued on July 17th, A. D. 1909.

On July 22d, A. D. 1909, at 11 o'clock the parties appeared in Court.

District Attorney Tuttle made a statement, that an understanding was had with the defendant and his Attorney, that the house referred to in the complaint, should not be used or let hereafter for immoral purposes, and with that purpose in view, and the consent and acquiescence of the complainant herein, he made a motion to dismiss this case; and in consideration of all the circumstances in the case, and the improbability of conviction of the defendant in the event of proceeding with the case to its close, on account of the bias of the jurors, the Court dismissed the case, and discharged the jury, witnesses, and defendant.

(Sgd) JACOB KUENZLY,
Justice of the Peace.

State of California }
County of Placer } ss.

I, the undersigned Jacob Kuenzly, Justice of the Peace of Township No. 13, do hereby certify that the foregoing is a copy or abstract of the proceedings in the case of the People of

the State of California against Henry H. Katz, as the same appears on my docket.

Witness my hand, this 22d day of April, 1914.

(Sgd) JACOB KUENZLY,
Justice of the Peace."

AFFIDAVIT OF FRANK SCHILLINGER.

(p. 101 Immigration record.)

"State of California, }
County of Placer. } ss.

Frank Schillinger, of lawful age, being first duly sworn, deposes and says:

That he is now and at all times herein mentioned has been a citizen of the United States, residing in the Town of Colfax, in said County and State; that during the early portion of the year 1909 he was the owner and residing upon Lots 8 and 9 of Block E, on Church Street, in said Town of Colfax, with his family consisting of his wife and two (2) children; that by grant, bargain and sale deed, dated June 15th, 1909, the affiant sold and delivered to Harry H. Katz the hereinabove described lots, including the two (2) room house above mentioned as his residence, situate thereon, for the sum of five hundred (500) dollars; that he was persuaded to sell to said Katz because said Katz stated that he would buy the lots next to affiant and build thereon if affiant did not sell said lots to him; that said Katz had been conducting a house of prostitution near the railroad track in said Town of Colfax, and that affiant told said Katz that if he undertook to use said residence of

affiant as a house of prostitution that he, (Katz) would get into trouble, and that the neighbors would drive him out; that said Katz replied to affiant that the neighbors would get used to it; that thereafter said Katz used said property as a house of prostitution, remodeling the same and adding small rooms thereto, where women plied their profession of prostitution and great numbers of men came, both day and night, to the great scandal and resentment of the neighborhood, and that such use continued for about one (1) year.

(Signed) FRANK SCHILLINGER.

Subscribed and sworn to before me this 25th day of April, 1914.

(Signed) MORRIS LOBNER,

Notary Public in and For the County of Placer, State of California."

AFFIDAVIT OF MINNIE G. WILLIAMS

(pp. 148-149-150 Immigration Record.)

"State of California, }
County of Placer. } ss.

Minnie G. Williams, being duly sworn deposes and says: That she is a citizen and has been for the past twenty years a citizen of the City of Colfax, California. To the ridiculing of the counsel for the defense of the affidavits presented by members of the Committee of Fifteen and others, the affiant makes reply as follows:

The counsel for the defense avers again and again that the affidavits of a goodly number of respectable citizens should be given no credence, 'in the face of the denial of Dr. Katz'. Each and every person making affidavit to the disreputable character of Dr. Katz, is a person of irreproachable character, a person of noted veracity. Is it reasonable to suppose that these people would be guilty of registering such appalling accusations against any individual unless they were driven to it by good and sufficient reasons? Any one of the accusers of Dr. Katz would lose a hand rather than besmirch the character of an innocent person. The affiant avers that the denials of a man of the character of Dr. Katz should be given no credence in the face of the sworn statements of so many upright citizens. Dr. Katz is a menace to our community, a menace to any community wherein he resides, and the removal of this menace is the only motive that has prompted the institution of proceedings against him. Dr. Katz and his associates have had ample warning, have purposely been given ample time, in order that they might withdraw peaceably. Dr. Katz was not ignorant of the fact that he was conducting a business in direct violation of the laws of California, but he chose to defy the laws of California, and it is the business of the State to uphold its laws.

The women composing the organization known as the Committee of Fifteen are not suffragettes, are not militants, are not agitators. They are teachers, business women, home-loving women, women on whom rests no stain, women of modesty, refinement and culture.

These women realize the danger threatening their homes, threatening all the Colfax homes, and it is this that prompted them to come out into the public glare and fight. Women that will not fight for their homes and loved ones are unworthy the name of women. When the laws of the State of California are so drastic against the crime of prostitution, the plaintiffs in this case can see no reason for permitting the debauchery of the young people of Colfax in order that the Katz Brothers may be enabled to pick up easy money by exploiting the shame of women.

The Counsel for the defense avers that the affidavits of the complainants should be given no credence as they are based on information and belief. Information and belief is all that is required by law. The people opposed to the crime of prostitution are in the habit of keeping as far away from brothels as possible and therefore could not testify to occurrences from actual experience. The people that frequent brothels, and who could give damaging evidence if they would, will not do so. As no man would be forced to incriminate himself, and as the law recognizes the fact that it would be almost impossible to get actual evidence, it is very plainly stated in the law that common repute is all that is necessary for incriminating in this particular form of crime.

The men who have made affidavits to the good character of Harry Katz and Joe Katz are not men with high moral standards of morality. They are of the class that thinks the sowing of wild oats is a necessity, that manliness and libertinism are synonymous terms. The most of

them are interested directly or indirectly in the liquor business. They would not be held up as examples for the sons of the complainants to emulate.

The affiant further deposes and says that every affidavit offered in the accusation of Katz Brothers is absolutely relevant, material and pertaining to the case. Considerable of the evidence in the affidavits was presented for the purpose of giving the lie to the testimony of the Katz Brothers, which it did. If the Katz Brothers would swear falsely to a part of the testimony there is no reason for believing any part of their testimony.

The Katz's stated they had no knowledge of the character of the inmates occupying their house at the west entrance to town. The affidavits of C. W. Hanson shows that Harry Katz was brought to trial because of his ownership of this disorderly house, and because of the nuisance it was to the neighborhood. It is quite evident that there was no feeling of animosity or spite, when the complainants allowed the case to be dismissed upon Harry Katz promising to never again attempt to allow the house to be used for immoral purposes. All this can be further verified by the court records. All of which proves beyond question that the testimony of the Katz Brothers and the affidavits of D. A. Russell and P. W. Crider are absolutely false. The statement of Harry Katz, that he could not remove a fence because a carpenter had put it up is worthy of an imbecile. We expected the counsel for the defense would have sense enough to avoid calling attention to so silly a statement.

Harry Katz did not, as far as we know make any further attempt to conduct a brothel within his house at the west entrance to town, but he, as soon as possible, got possession of a house and lot at the north entrance to town, and proceeded to establish his prostitutes there and continue his nefarious business. That Harry Katz has not lived here continuously four years is irrelevant, immaterial and not pertaining to the case. He was interested enough here to leave his business in Stockton and come to Colfax several days each month as shown by the former affidavit. The affiant further states and wishes to emphasize that during the visits of Harry Katz to Colfax, that beyond any shadow of doubt, he resided with woman, Nellie White, whom he claims was merely a tenant, and of whose character he knew nothing. Harry Katz testifies that he had nothing to do with the house at the north entrance to town. The affiant showed in her former affidavit that Harry Katz paid part of the bills, and that the bills paid by Joe Katz were first submitted to Harry Katz which shows conclusively that Harry Katz had a great deal to do with the aforesaid house, and reveals the falseness of the testimony of both Harry Katz and Joe Katz. The plaintiffs in this case, who represent and are acting for the moral element of Colfax appeal to the State of California, appeal to the Federal Government to be relieved of the presence of these arch fiends. We pray that unscrupulous lawyers may not be permitted to juggle with the laws of the State and Nation—we pray that justice may be allowed to prevail. In witness

whereof the aforesaid affiant has hereunto set her hand and seal.

(Sgd.) MINNIE G. WILLIAMS,

Subscribed and sworn to before me this 29th day of July, 1914.

(Sgd.) MORRIS LOBNER,
Notary Public."

REPORT SUBMITTED TO THE SECRETARY OF LABOR ON BEHALF OF CITIZENS OF COLFAX.

(pp. 147-148 Immigration record.)

"Colfax, California, July 26, 1914.

Hon. Secretary of Labor,
Washington, D. C.

Sir:

We, the undersigned citizens of Colfax, wish to protest to you against the efforts made to prevent the deportation of Harry and Joseph Katz, charged with being undesirable aliens and keepers of a house of prostitution in Colfax. We make this protest not because of any feeling of ill-will or malice against these aliens individually, but because we feel that their influence and actions tend to lower the moral tone of the City and because of the baneful influence they have exerted and are exerting upon the youth of this City.

Affidavits have been prepared and furnished by friends of the defendants claiming that they, the defendants, are moral citizens and that they have never been connected with the business of prostitution in this City. We know that these affidavits do not contain the truth because for years Harry and Joseph Katz have been owning a house of prostitution in this City and it has been a matter of common knowledge that they were profiting by the earnings of prostitutes.

The reason the deportation of these individuals was and is being sought is the fact that they have been ringleaders in the work of prostitution and that we felt the only way in which we could protect our growing youths was to abolish that trade. The appeal to local authorities was vain because of the activity of certain of the men who have signed affidavits in their behalf. Being men with some financial backing and political in standing and connected with the liquor traffic they could wield sufficient influence to prevent justice in the local courts. We felt that the Federal government being uninfluenced by local matters could by the deportation of Harry and Joseph Katz put the seal of official disapproval upon their nefarious traffic and protect the young of our City. That anyone could be found who would testify under oath that Harry and Joseph Katz were not guilty as charged was beyond our belief. Because such have testified we feel it our duty to urge you to listen to the testimony of fathers and mothers who are interested.

We, the undersigned, again affirm our belief

in the guilt of Harry and Joseph Katz, and ask that our City be protected from them.

Respectfully submitted,

(Sgd.)

Robert A. Peers, Physician, father of two boys,

Lucy F. Peers, wife of Robert A. Peers,

Morris Lobner, Retired R. R. Agt., father of 2 daughters,

O. E. Williams, merchant, father of 2 daughters, and 1 son,

Grant McMullen, merchant, father of 1 daughter and 1 son,

Geo. Elbert, merchant, father one son,

C. E. Schoonoover, telegrapher, 3 daughters, 1 son,

(Mrs.) Mamie L. Schoonoover, wife of C. E. Schoonoover,

Mary Hanson, Housewife and schooltrustee,

J. Robinson (?) father of one son,

Wm. G. Carter, minister, father of four sons,

Esther V. Carter, mother of four sons,

Emma L. Williams, wife of O. E. Williams,

E. H. Honn, rural mail carrier, father of two daughters and 1 son,

Rosa A. Honn, mother of two daughters and 1 son, wife of E. H. Honn, is a housewife,

W. B. Fowler, hotel keeper, father of one son,

Harvey L. Wolfson, rancher, father of two daughters and 1 son,

Katie P. Wolfson, mother of two daughters and 1 son, wife of Harvey L. Wolfson,

F. G. Irving, rancher, father of one daughter,

Mrs. Mary K. Irving, wife of F. G. Irving,

Minnie G. Williams, bookkeeper, wife of S.
 K. Williams,
 S. K. Williams, lumber merchant,
 J. L. Rollins, M. D., father of 8 children,
 Eliza Lang Perkins,
 Jeannie K. Lobner, wife of Moris Lobner,
 Frances E. West, wife of Geo. E. West,
 Sadie A. Robinson, mother of one boy."

AFFIDAVIT OF EDWARD H. HONN.

(p. 153 Immigration record.)

"State of California }
 County of Placer } ss.

Edward H. Honn being duly sworn deposes and says, that he is now and for over five years past has been a resident of Colfax, California, that he knows H. H. Katz and knows of him when it was commonly understood that he conducted and managed a house of prostitution in said City of Colfax in 1909, in Church Street, that after the arrest of said H. H. Katz for his ownership of said brothel in 1909, he proceeded within a few weeks thereafter to get possession of a house and lot at the north entrance of said City of Colfax and proceeded to enlarge said house and equip it for prostitution and to establish therein the prostitute Nellie White whom he formerly had within his house in aforesaid Church Street, and according to general repute continued, until his arrest in 1914, to conduct and manage said house of ill fame at the north entrance to said city of Col-

fax; that H. H. Katz came regularly and continuously from Stockton or Sacramento to Colfax and remained in Colfax several days each month with headquarters in aforesaid house of ill fame, that the prostitute Nellie White, was commonly described as 'Nellie Katz' and as the 'Katz woman.'

The affiant further avers that it is understood, and, ever since the said H. H. Katz established said house of prostitution at the north entrance of town it has generally been accepted as a fact by the people of Colfax that the Katz Brothers, H. H. Katz and Joseph Katz, conducted said house of prostitution at the north entrance to town, managing and directing the same, and that no one was ever heard to deny that they conducted and managed the said house of prostitution until they, the Katz Brothers were arrested in 1914.

(Sgd.) EDWARD H. HONN,
Rural letter carrier.

Subscribed and sworn to before me this first day of August, 1914.

MORRIS LOBNER
Notary Public in and for Placer
County, California."

AFFIDAVIT OF FERGUS GRAHAM IRVING
(p. 97 Immigration record.)

"State of California }
County of Placer } ss.

Fergus Graham Irving, being duly sworn, on oath deposes and says that he is a citizen of

the United States, that he has lived in the town of Colfax, California, for fifteen years. That he came to Colfax in the year 1885, remained in Colfax continuously until 1898. That he returned to Colfax in February, 1912, and has been a resident of the town of Colfax ever since. He is married and his wife's name is Minnie Kimble Irving. That he knows Nellie White by sight and has seen her at various times in the town of Colfax in the house of prostitution on the County road in the Northern part of Colfax, which house is owned and controlled by Katz Brothers. That he has frequently seen Harry Katz during the last two years about said house of prostitution at different times of the day and that he seemed to be entertaining the female inmates of the house, and superintending repairs and improvements about the house and grounds. That the house is well known by reputation in the town of Colfax, as a house of prostitution, where there are several prostitutes living and plying their profession. That the place is frequented day and night by great numbers of men; that he has seen them going to and coming from the said house of prostitution.

(Sgd.) FERGUS GRAHAM IRVING.

Subscribed and sworn to before me this 25th day of April, 1914.

(Sgd.) MORRIS LOBNER.

Notary Public in and for the County
of Placer, State of California."

AFFIDAVIT OF LUCY F. PEERS,

(p. 154 Immigration record.)

“State of California }
County of Placer } ss.

Lucy F. Peers being duly sworn deposes and says: She is now and during all times herein mentioned was a resident of the City of Colfax, Placer County, State of California. That in August 1913 the affiant in company with Jeannie K. Lobner called upon Geo. H. Hamilton, then District Attorney of Placer County, and asked him to abolish the house of prostitution run by H. H. Katz and Joseph Katz, situated at the north entrance to Colfax.

That said District Attorney, Geo. W. Hamilton, replied that he knew the house mentioned, that H. H. Katz was a personal friend and client of his, that he (Hamilton) defended H. H. Katz on a previous occasion in 1910 when accused of conducting a house of prostitution at the west entrance of Colfax, that he (Hamilton) knew more about this place than the complainants, that he (Hamilton) knew the character of this house at the north entrance to Colfax, that it was generally known that the Katz Brothers were associated with the house, and that any one who tried to deny it would be a fool, that he (Hamilton) had influence with H. H. Katz and that he could go up to Colfax that very afternoon and persuade H. H. Katz that he had conducted the place long enough, that it was now time to quit the business; that affiant and Jeannie K. Lobner then and there asked H. H.

Katz's former attorney, Mr. Geo. W. Hamilton, then District Attorney of Placer County, to do as he said he had the power to do. Said Hamilton thereupon refused unless a warrant was sworn to and case brought to trial.

(Sgd.) LUCY F. PEERS

Subscribed and sworn to before me this 31st day of July, 1914.

MORRIS LOBNER,
Notary Public for Placer County."

The government desires to call attention to the fact that this affidavit throws considerable light on the affidavit of George W. Hamilton, who was evidently an enthusiastic supporter of the Katz Brothers.

AFFIDAVIT OF ROBERT A. PEERS

(p. 155 Immigration record.)

"State of California }
County of Placer } ss.

Robert A. Peers, of lawful age, being first duly sworn, deposes and says:

That he is now, and at all times herein mentioned has been a citizen of Colfax, Placer County, State of California, and has been a practicing physician therein; that he has been acquainted with Harry Katz, also known as Dr. H. H. Katz, the alien described under department Warrant No. 5377L202, dated March 18, 1914, for a period of five years last past; that he knows the property described as lots 8 and 9

of Block E on Church St. and affiant avers that he was one of several citizens who petitioned the then District Attorney of Placer County, Charles Tuttle, to have the nuisance, consisting of a house of prostitution run by said Harry Katz on the lots 8 and 9, aforesaid, abated. The affiant also avers that said Harry Katz was arrested for conducting a house of prostitution at these premises during the year 1909. The affiant avers that it was a well-known fact that Harry Katz was arrested in the year 1909, because he was managing a house of prostitution and that he was brought before Justice of the Peace Kuenzley in an effort to close said house of prostitution. The affiant also avers that since that time the two brothers, Harry Katz and Joseph Katz, have conducted a house of prostitution on the property described as lot 1, Block 2, additional survey of the town of Colfax and it is a well-known fact in Colfax that the Katz Bros. were interested in the management of this house of prostitution, over which Nellie White, a notorious prostitute presided as madam. The affiant avers that he has never heard these things denied until the arrest of Joseph and Harry Katz in 1914. The affiant further avers that he has known Joseph Katz for a period of three years last past. The affiant further avers that he has frequently heard the property on lot 1, Block 2, aforesaid, described as the 'Katz house' and as 'Katz whore-house'. The affiant further avers that Harry Katz made frequent visits to Colfax previous to his arrest and that it was generally understood by the people of Colfax that such visits were because of his interest in

the management of the house of prostitution where Nellie White presided as madam.

(Sgd.) ROBERT A. PEERS, M. D.

Subscribed and sworn to before me this 10th day of August 1914.

(Sgd.) MORRIS LOBNER,
Notary Public in and for the County
of Placer, State of California."

Besides the affidavits set forth herewith, the government calls attention to various other affidavits filed in this case and considered by the Secretary of Labor in making the order of deportation of said Harry Katz. The affidavits are as follows:

AFFIDAVIT OF ROBERT F. POTTOL

(p. 79 Immigration record.)

"State of California }
County of Placer } ss.

Robert F. Pottol, being duly sworn deposes and says that he is a citizen of the United States and has lived about five miles north of the City of Colfax, California, for nearly two years past; that he is not married; that in going to and from his home to Colfax he has been compelled to pass the 'Red-light' district which lies on the County road; that by common repute he has known the exact location of the said 'Red-light' district; that about one year and one half ago, he was passing on the railroad track near the

alleged house of prostitution kept by one Nellie White, he was accosted by a woman apparently an inmate of said house, who invited him to go to the house with her; that he has occasion to pass these houses of prostitution two or three times a week; that he has seen at various times women who were inmates of the said houses going into them; that these houses were spoken of and by common repute were known as houses of ill-fame; that he has passed these places as late as February 1914; that Charles Rath, an acquaintance had informed him that he (the said Rath) had visited these houses and contracted a loathsome disease.

(Sgd.) ROBERT F. POTTOL

Subscribed and sworn to before me this 20th day of May, 1914.

(Sgd.) MORRIS S. LOBNER
Notary Public in and for the County
of Placer, State of California."

AFFIDAVIT OF J. T. TAYLOR

(p. 80 Immigration record.)

"State of California }
County of Placer } ss.

J. T. Taylor, being duly sworn, deposes and says he is a citizen of the United States, that he has lived in the vicinity of the City of Colfax, State of California, for five years past; that he is not married; that on going to and from the said City he is compelled to pass a certain house

the management of the house of prostitution where Nellie White presided as madam.

(Sgd.) ROBERT A. PEERS, M. D.

Subscribed and sworn to before me this 10th day of August 1914.

(Sgd.) MORRIS LOBNER,
Notary Public in and for the County
of Placer, State of California."

Besides the affidavits set forth herewith, the government calls attention to various other affidavits filed in this case and considered by the Secretary of Labor in making the order of deportation of said Harry Katz. The affidavits are as follows:

AFFIDAVIT OF ROBERT F. POTTOL

(p. 79 Immigration record.)

"State of California }
County of Placer } ss.

Robert F. Pottol, being duly sworn deposes and says that he is a citizen of the United States and has lived about five miles north of the City of Colfax, California, for nearly two years past; that he is not married; that in going to and from his home to Colfax he has been compelled to pass the 'Red-light' district which lies on the County road; that by common repute he has known the exact location of the said 'Red-light' district; that about one year and one half ago, he was passing on the railroad track near the

alleged house of prostitution kept by one Nellie White, he was accosted by a woman apparently an inmate of said house, who invited him to go to the house with her; that he has occasion to pass these houses of prostitution two or three times a week; that he has seen at various times women who were inmates of the said houses going into them; that these houses were spoken of and by common repute were known as houses of ill-fame; that he has passed these places as late as February 1914; that Charles Rath, an acquaintance had informed him that he (the said Rath) had visited these houses and contracted a loathsome disease.

(Sgd.) ROBERT F. POTTOL

Subscribed and sworn to before me this 20th day of May, 1914.

(Sgd.) MORRIS S. LOBNER
Notary Public in and for the County
of Placer, State of California."

AFFIDAVIT OF J. T. TAYLOR

(p. 80 Immigration record.)

"State of California }
County of Placer } ss.

J. T. Taylor, being duly sworn, deposes and says he is a citizen of the United States, that he has lived in the vicinity of the City of Colfax, State of California, for five years past; that he is not married; that on going to and from the said City he is compelled to pass a certain house

of prostitution run by one Nellie White on the County road; that during the erection of said house he frequently saw Harry H. Katz superintending and directing about the place and acting in a manner indicating proprietorship; that he knows the said Harry H. Katz and his brother Joe Katz; that he knows the said house to be a house of ill-fame; that on two occasions he has been solicited by the inmates of said house to enter said house.

(Sgd.) J. T. TAYLOR,

Subscribed and sworn to before me this 19th day of May, 1914.

(Sgd.) MORRIS LOBNER
Notary Public in and for the County
of Placer, State of California."

AFFIDAVIT OF JEANNIE KENDALL LOBNER

(p. 81 Immigration record.)

"State of California }
County of Placer } ss.

Jeannie Kendall Lobner, being duly sworn, deposes and says that she is a citizen of the United States and has lived in the City of Colfax, California, for twenty-eight years past; that she is married and living with her husband and family; that during the time that Nellie White, a prostitute, kept a house of ill-fame on the corner of Church Street and Rising Sun Road in the said City of Colfax, which said house was in plain view from the affiant's residence, she

often saw men going to and coming from said house of ill-fame, especially on Sunday, when they could be seen going there throughout the day singly and in groups of four or five.

(Sgd.) JEANNIE KENDALL LOBNER

Subscribed and sworn to this 19th day of May, 1914.

(Sgd.) MORRIS LOBNER

Notary Public in and for the County of Placer, State of California.”

AFFIDAVIT OF HARVEY L. WOLFSEN

(p. 94 Immigration record)

“State of California }
County of Placer } ss.

Harvey L. Wolfesen, being duly sworn, deposes and says he is a citizen of the United States, and that he has lived in the vicinity of the City of Colfax, California, for two years last past; that his residence is about 11½ miles north of the said city; that he is a married man and has children; that on his way to and from the said City he is compelled to pass a certain house of prostitution run by one Nellie White on the county road; that during the winter of 1912 and 1913 he has seen Dr. Harry H. Katz about the said house apparently superintending the repairing; that he believes and is of the opinion that the house referred to is owned by the Katz Brothers, known as Joe and Harry; that on two or three occasions during

the past year, while he himself was passing the said house, the female inmates thereof known as prostitutes did make overtures to him to enter their house of ill-fame; that on one occasion during said time he remembers particularly on going to his home with some friend, the woman in Nellie White's house did attempt to induce him and his friend to stop at the said house by whistling and gesticulation; that the before mentioned house is well known by reputation in the City of Colfax as a house of prostitution; that there are several prostitutes plying their vocation there; that the place is frequented day and night by a great number of men; that the affiant has seen them coming and going to said house of prostitution.

(Sgd.) HARVEY L. WOLFSEN.

Subscribed and sworn to before me this 19th day of May, 1914.

(Sgd.) MORRIS LOBNER,
Notary Public in and for the County of
of Placer, State of California."

AFFIDAVIT OF MINNIE G. WILLIAMS

(p. 94+ Immigration record.)

"State of California	}	ss.
County of Placer		

Minnie G. Williams, being duly sworn, on oath deposes and says that she is a citizen of the United States and that she has been a resident of the City of Colfax, California, for

twenty-eight years last past; that she knows Nellie White by sight; that she knows Harry H. Katz and Joe Katz.

The house occupied by said Nellie White, which is situated at the northern entrance to the City of Colfax, and alleged to belong to the Katz Brothers, the affiant has never heard referred to in any other way than the 'Red-lights', and 'Hook-shop', the 'whore-house', or the 'Sporting house'. The affiant further states that the character of the said house is so well known in the community that she has even heard children use the above terms in speaking of this said house.

In September, 1911, the affiant overheard a city official giving directions to a couple of strangers who were inquiring for a 'sporting house'. The directions given by said city official were explicit and could lead to no other house but the one occupied by Nellie White. It is the firm belief of the affiant that the aforementioned house is and always has been a house of prostitution and is so considered by the entire community.

The affiant has noted that Harry H. Katz' visits to Colfax were frequent, up to the time of his arrest, on or about April 13, 1914; that during his visits, the said Harry H. Katz was wont to pass the affiant's house several times a day along the road leading to the house occupied by Nellie White, at the north entrance to town; the conduct of the said Harry H. Katz was that of a man going to and from his abiding place, and it is the firm belief of the affiant

that the aforesaid house, occupied by Nellie White was the headquarters of Harry H. Katz whenever he was in Colfax.

The affiant is the bookkeeper for the Colfax yard of the Auburn Lumber Company, and she further deposes and says that from November 13, 1911, to October 13, 1913, the bills for material used in enlarging and improving the house at the north entrance to town, occupied by Nellie White, were made out in the name of Joe Katz; that on one occasion said Joe Katz came into the office to pay his bill; that she, the affiant, asked this Joe Katz for his bill so she could receipt same; that he, Joe Katz, said he did not have it with him, as he had sent it to his brother Harry in Stockton; that she, the affiant, offered in the future, to render all bills in duplicate; that Joe Katz said he would be glad to have the bills rendered in this way, so that he and his brother could each have a copy. The affiant further states that from October 13, 1913, to February 6, 1914, all bills for material furnished and delivered to the house herein discussed were made out in the name of Harry Katz, in obedience to the orders of Joe Katz; that all material furnished by the Auburn Lumber Company and charged to Joe Katz or Harry Katz went to the establishment occupied by Nellie White. The affiant has been in a position to observe many times Joe Katz and Harry Katz in conference with each other, discussing legal looking documents.

The Katz Brothers were, to all appearances, a close corporation in their business affairs.

The affiant further deposes and says that the copies of the bills hereunto attached to the affidavit are true copies of some of the aforesaid house; that the claims in said bills have been fully satisfied by the Katz Brothers.

(Sgd.) MINNIE G. WILLIAMS,

Subscribed and sworn to before me this 20th day of May, 1914.

(Sgd.) MORRIS LOBNER,

Notary Public in and for the County of
of Placer, State of California."

AFFIDAVIT OF CHARLES W. HANSON

(p. 96 Immigration record.)

"State of California }
County of Placer } ss.

Charles W. Hanson, being duly sworn, on oath deposes and says that he is a citizen of the United States, that he has lived in Colfax, California, continuously for the last forty-five years; that he is married and that his wife's name is Mary Hanson and that they have two children, a boy and a girl. That in July 2d, 1909, he made a complaint to Justice Kuenzley, against Harry Katz, for renting his house for immoral purposes; that when the case was called a Jury could not be obtained; that he then circulated a petition asking the County Supervisors to restrain said Harry Katz from renting his residence for this purpose, stating that the place was located in the Western residence part of the

town of Colfax, on the County Road and in close proximity to two churches; that he obtained the signatures of thirty or forty people, who lived near or had to pass by this house on their way to and from town; that the house originally consisted of but three rooms, but numerous additions and sheds were added until the place looked like a bathing establishment; that the board fence about eight feet high was built along the road; red curtains ornamented the windows; that an electric piano and a graphophone were put in and that a dress making sign was displayed. That they seemed to have a good line of customers, all men. That the Supervisors instructed the District Attorney, C. A. Tuttle, to investigate. That the fence was ordered taken down, also the sign. That another sign, 'Palace Rooms', was substituted. That at this time Colfax voted on incorporation and became a City of the sixth class, and that this action took the case out of the jurisdiction of the Board of Supervisors and placed it into the hands of the City Trustees; that the Trustees advised the inmates of this house (there were usually three inmates) to move to another place; that they then moved to the house owned until recently by Joe Katz. That the Madame at both of these houses to the best of his knowledge and belief was Nellie White: that he had never heard her called 'Williams'. That he saw Harry Katz go to and from the place many times and that it was impossible for him not to know the character of it: That it was generally known as a house of ill-fame throughout the town, being the only house of the kind at that time. That Harry

Katz tried to purchase property from his father, Mr. Charles Hanson, and that said Charles Hanson refused to sell to him, believing that said Harry Katz intended to use the property for immoral purposes.

(Sgd.) CHARLES W. HANSON

Subscribed and sworn to before me this 19th day of May, 1914.

(Sgd.) MORRIS LOBNER
Notary Public in and for the County
of Placer, State of California."

Besides the foregoing affidavits, Joseph Katz stated to D. J. Griffiths, one of the Immigration Inspectors, that Harry Katz was interested in the property in question. The statement of the Immigration Inspector covering this phase of the case is found on page 110 of the Immigration record and is as follows:

"On the 24th of last February I went to Colfax and investigated the matter. I spoke to Nellie White, who was known as a notorious prostitute who had been doing business in that town for several years, and elsewhere in this State, and she stated she was paying Joseph Katz \$25 a month for the rental of the house and that she had two girls there and was conducting a house of prostitution. When I confronted Joseph Katz with this information he said that he was not the party interested but that his brother, Dr. Harry Katz, was the

party. On the morning of the 25th of February the inmates of the two houses which had been established in that town appeared before the Justice' court for a hearing and all swore they were citizens of the United States except the White woman. They pleaded 'not guilty' and asked for a jury trial and the inmates were placed on \$150 bail. This bail was furnished for Nellie White by Joseph Katz with money furnished him by a wholesale liquor dealer named Durnim who, it is alleged, furnished the liquor and refreshments for Nellie White's house. He is one of the men who makes an affidavit to the good character and reputation of Joseph Katz. That day, upon learning that Joseph and Nellie White were aliens, I immediately applied by telegraph to the Department for warrants of arrest. Before I could receive the necessary instructions from Washington, Nellie White and Joseph Katz had mysteriously disappeared from the town. Subsequently Joseph Katz surrendered himself. The last information I had concerning Nellie White was that she was seen with Joseph Katz and Dr. Katz in Sacramento on the evening of the 25th of February last. Subsequently I learned that Dr. H. H. Katz was an alien and application was made for warrant of arrest in his case and he has been given a hearing as stated."

On page 119 of the Immigration record Joseph Katz admitted that he told the Immigration Inspector that his brother, Harry, owned the property in question, and in this connection the following questions were asked and answers given:

“Q. Well Harry, your brother has some interests there has he not?

A. He has property.

Q. Where were his interests located?

A. In Colfax.

Q. Nellie White had a house of prostitution and at your brother Harry's place in Colfax before she went out to your house?

A. I don't know anything about it sir.

Q. Did you not know that she was driven from there and took refuge at your place?

A. No sir.

Q. They have had considerable trouble with houses of prostitution in Colfax lately?

A. I don't know. I mind my own business and never butt into anybody else's business.

Q. Do you remember telling me when I first spoke to you about this matter that Harry was the one that was interested in those places?

A. I just happened to think about it and I told you Harry. I did not know who you were and I did not think you had any business to know anything about my affairs. You did not tell me who you were or that you had any authority. You were a stranger to me and therefore I did not tell you.”

The evidence clearly shows that after the investigation of the Katz Brothers begun, Nellie White, the party who occupied the premises in question as an alleged prostitute, disappeared, and on page 114 of the Immigration record, Harry Katz admitted that he, his brother Joseph, and Nellie White were all together at the office of Attorney Luke Howe in Sacramento.

After all of the matters to which the Court's attention has been called, together with various affidavits filed on behalf of the Katz Brothers, the Immigration Inspector who had given the case a very thorough consideration, among other things, stated the following:

“In this case there seems to be a much closer relation than mere landlord and tenant existing between the Katz Brothers and Nellie White. The Committee of Fifteen Ladies of Colfax, who represent many of the women there, and a number of men who are opposed to the red-light district, emphatically insist in stating that Nellie White, a prior acquaintance of the Katz Brothers, was brought to that town for the sole purpose of conducting a house of prostitution, and that she was installed in the Katz house with that object in view, and their contention seems to be sustained by the record in the case. The Katz Brothers were the first to open a house of ill-fame in Colfax, and have continued the illegitimate business for the five years last past. The people who are opposed to the brothel aforesaid insist that you call the Secretary's attention to the fact that at least one phase of the law governing the subject has been violated beyond a reasonable doubt, in this, that the Katz Brothers did receive, share in, and derive benefit from the earnings of a prostitute, in the shape of rents, and that they did assist and protect her as the madam of the brothel, and furnish her with the necessary conveniences to carry on her nefarious business in violation of the statutory provision.”

It is true, and the government is willing to admit, that there are various affidavits in the Immigration record to the effect that the Katz Brothers bore a good reputation, but an examination of these affidavits, and also the affidavits of the government, will disclose that the said affidavits introduced in behalf of the Katz Brothers were either signed by people living out of the City of Colfax, and who for that reason were not in a position to know the facts which necessarily would be of a local nature, or by men engaged in the saloon business, and who no doubt had benefited from the business conducted by the Katz Brothers.

With the evidence now before the Court upon which the Secretary of Labor based his order of deportation, the question to be determined is whether or not the proceedings of the Immigration Bureau were manifestly unfair, or whether the action taken by the said Bureau was such as to prevent a fair investigation, or whether the action taken by the said Bureau amounted to a manifest abuse of discretion. It was necessary to determine the foregoing, for, unless there was unfairness, or an abuse of discretion, the proceedings are not open to attack.

Low Wah Suey vs. Backus, 225 U. S. 460,
U. S. vs. Ju Toy, 198 U. S. 253; 49 L. Ed.
 1040,

Chin You vs. U. S., 208 U. S. 852,
Tang Tun vs. Edsell, 223 U. S. 673.

The findings of the Secretary of Labor are final and conclusive.

Ekiu vs. U. S., 142 U. S. 651,

Lee Lung vs. Patterson, 186 U. S. 170,

The Japanese Immigrant case 189 U. S., page 86,

Tang Tun vs. Edsell, 223 U. S. 673,

Low Wah Suey vs. Backus, 225 U. S. 460,

U. S. vs. Ju Toy, 198 U. S. 253,

Zakonaite vs. Wolf, 226 U. S. 272,

Chin You vs. U. S. 208, U. S. 8,

Healy vs. Backus, 221 Fed. 358.

In *Lee Lung vs. Patterson*, *supra*, the Court said:

“It was decided in *Nishimura Ekiu’s* case that Congress might intrust to an executive officer the final determination of the facts upon which an alien’s right to land in the United States was made to depend, and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted or to controvert its sufficiency. This doctrine was affirmed in *Lem Moon Sing vs. U. S.*, 158 U. S. 538, 39 L. Ed. 1082; 15 Sup. Ct. Rep. 967 and at the present term in *Fok Young Yo vs. U. S.*, 185 U. S. 306.”

In *Low Wah Suey vs. Backus*, the Court said:

“A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair; that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final.

U. S. vs. Ju Toy, 198 U. S. 253,
Chin Yow vs. U. S., 208 U. S. 8,
Tang Tun vs. Edsell, 223 U. S. 673.”

From the very nature of the investigation, the hearings of the executive officers must be of a summary character.

Chin Yow vs. U. S., 208 U. S. 8,
Sibray vs. U. S., 227 Fed. 1,

and not subject to the formalities of procedure and rules governing the admissibility of evidence.

Ex parte Garcia, 205 Fed. 53,
Fong Yue Tung vs. U. S., 149 U. S. 698,
U. S. vs. Hong Chang, 134 Fed. 19,

Jew Yuen Case, 188 Fed. 350,
Choy Gum vs. Backus, 223 Fed. 487,
Siniscalchi vs. Thomas, 195 Fed. 701,
Jeung Bow vs. U. S., 228 Fed. 868.

The hearings may be conducted upon affidavits, ex parte depositions and interviews.

Ekiu vs. U. S., 142 U. S. 651,
Low Wah Suey vs. Backus, 225 U. S. 460,
Ex parte Garcia, 205 Fed. 53,
White vs. Gregory, 213 Fed. 768,
Jeung Bow vs. U. S., supra.
Ex parte Chin Him, 227 Fed. 131,
Ex parte Wong Yee Toon, 227 Fed. 247.

In *Ekiu vs. U. S.*, supra, Mr. Justice Gray said:

“An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful (cases cited) and Congress may, if it sees fit, as in the statutes in question, in *United States vs. Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But on the other hand, the final determination of those facts may be intrusted by Congress to executive officers, and in such case, as in all others, in which a statute gives discretionary power to an officer, to be exercised

by him upon his own opinion of such facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by the law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. *Martin vs. Mott*, 25 U. S. Wheat. 19, 31 (6:537, 541); *Phil. & T. R. Co. vs. Stimpson*, 39 U. S. 14 Pet. 448, 458 (10: 535, 540); *Benson vs. McMahon*, 127 U. S., 457 (32: 234); *Oteiza y Cortes vs. Jacobus*, 136 U. S. 330 (34: 464)."

In *ex parte Wong Yee Toon*, supra, in discussing the power of courts to open up a case of Immigration officers, the court said:

"x x x The latter can interfere only when there is a total failure of all evidence upon which a fair-minded man would feel justified in acting. I certainly cannot find that there is any such lack here. If the question were one upon which it was my duty to pass, I am not prepared to say that I would not reach the same conclusion as that upon which the Secretary of Labor has acted."

In *ex parte Garcia* the alien was charged with violation of the Immigration Act in the same respect as appellee is charged in this case, and the Court, after giving the various questions which arose exhaustive consideration, said with respect to the use of affidavits, the following:

"Now, to the exact question, whether a trial by affidavits should be considered a 'fair hear-

ing': If the answer be in the affirmative, the writ must be denied; for, as we have already seen, there is no evidence of bad faith, and admittedly, if *ex parte* affidavits may be considered, there was before the Secretary ample evidence to justify the issuance of the warrant. So far as I have been able to discover, the specific point is not ruled by any decision of controlling authority; but certain general principles applicable to such hearings have in varying language been repeatedly enunciated. It is well settled that trials of this character are not governed by the rules of criminal procedure. *Fong Yue Ting vs. United States*, 149 U. S. 698, 730, 13 Sup. Ct. 1016, 37 L. Ed. 905; *United States vs. Hung Chang*, 134 Fed. 19, 25, 67 C. C. A. 93.

In *Lee Lung vs. Patterson*, 186 U. S. 168, 176, 22 Sup. Ct. 795, 797 (46 L. Ed. 1108), the Supreme Court said:

'But jurisdiction is given to the Collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper.' "

The mere fact that appellee has been in this country for several years does not render him immune to a prosecution and deportation under the section of the Immigration Laws, of which he is charged with a violation.

Zakonaite vs. Wolf, 226 U. S. 272,

Bugajewitz vs. Adams, 228 U. S. 584,

Ex parte Garcia, 205 Fed. 53,

And although a criminal prosecution of appellee for the same offense might have failed, yet said appellee would be subject to an order of deportation.

Lewis vs. Frick, 233 U. S. 291,

Bugajewitz vs. Adams, 228 U. S. 585.

In the case now under consideration, the record shows that the criminal charge placed against said appellee in the City of Colfax for conducting a house of prostitution some time prior to the present investigation was dismissed upon the understanding that the said appellee would discontinue conducting the business of operating a house of prostitution, but his subsequent acts have proven that his promise in this respect was made in bad faith.

In view of the foregoing, the government is now willing to rest its case and await the ruling of this Court to determine whether, in view of all the evidence submitted and proceedings taken on behalf of the government, there was an abuse of discre-

tion or any unfairness on the part of the Secretary of Labor and his subordinates in ordering the deportation of appellee.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney.

CASPER A. ORNBAUN,
Asst. U. S. Attorney.

Attorneys for Appellant.

No. 2917.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

SAMUEL W. BACKUS, as Commissioner
of Immigration at the Port of San Fran-
cisco, Who is Now Succeeded by ED-
WARD WHITE, as Commissioner of
said Port,

Appellant,

VS.

HARRY KATZ,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLEE

MARSHALL B. WOODWORTH,
Attorney for Appellee.

Filed this.....day of March, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.



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REPLY BRIEF ON BEHALF OF APPELLEE

STATEMENT OF THE CASE.

The appellee having been ordered deported, sued out a petition for a writ of *habeas corpus*, a demurrer was interposed, which was overruled, and thereafter a return was filed, and, after a hearing, the appellee was discharged by the Court below on the ground of the absolute insufficiency of any evidence "that he has been found connected with the management of a house of prostitution; and that he has been found re-

ceiving, sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes." (See Transcript of Record, p. 15.)

The appellant seeks a review of what is claimed to constitute evidence, but which, in reality, simply consist of surmises, conjectures, suspicions, rash inferences, and other matters not amounting to *competent evidence*.

Needless to say, that surmise, conjecture, rash inference, or even mere probabilities, do not afford a substitute for *some competent evidence*, upon which to inflict on an alien, who has sought an asylum in this country, such drastic punishment as banishment.

As was said in *Hanges v. Whitfield*, 209 Fed. Rep. 675, 679-680: The examination "must be a lawful proceeding, the charge established by *competent evidence*, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them." * * * "and but emphasizes the necessity of Immigration Officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported, *except upon legal evidence*, which establishes, with reasonable certainty, at least, the charges upon which it is sought to deport them."

As was also well said in *Ex parte Lam Pui*, 217 Fed. Rep. 456:

"It is also elementary that mere suspicion, conjecture, speculation is not evidence, neither can it be made the basis for finding a fact in issue."

This Circuit Court of Appeals announced the same

views in *Backus v. Owe Sam Gow*, 235 Fed. Rep. 847, 853-4:

"But mere suspicion or conjecture were not sufficient upon which to base a judgment * * * In the absence of the best evidence obtainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial inquiry. (Citing *United States v. Ju Toy*, 198 U. S. 253, 260, 25 Sup. Ct. 644, 40 L. Ed. 1140; *Chin Yow v. United States*, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; *In re Chan Kan*, 332 Fed. 855, 857, — C. C. A., and cases therein cited.)"

Counsel for appellant set out in full in their Opening Brief those affidavits, reports and other documents upon which they rely to justify a reversal of the decision of the court below. In fact, almost their entire brief is taken up with copies of these documents.

It is, therefore, at the outset, highly important to ascertain the views of the learned Judge of the court below when he decided that there was "no real evidence against the petitioner."

We insert his opinion in full:

"The records here which accompany the petition show *no real evidence against the petitioner. The affidavits are upon information and belief, and express only the opinions of the affiants.* It is true that in this State the reputation of a house as a house of ill-fame, may be shown, but I know of no rule, here or elsewhere, which permits the ownership or management of such a house to be thus proved. There should be, in my opinion, some *fair, substantial testimony* upon which to base an order deporting from this country an

alien who has lawfully entered it. The record here is too long to recite, but the closest scrutiny of it will not reveal in all the testimony taken, whether in the presence or absence of petitioner, *any competent evidence*, and by that I mean evidence *other than pure hearsay and expressions of opinion*, tending to support the finding that petitioner was *either connected with the management of a house of prostitution or has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes*. It may be true that the presence of petitioner in this country is displeasing to many worthy people, but he may not be deported for that reason. He can only be deported after a *fair hearing*, and then only when the order deporting him finds support in something other than *mere hearsay and opinion*. The demurrer to the petition will be overruled, and a writ will issue returnable December 11th, 1915, at 10 o'clock a. m.

"November 26th, 1915.

"M. T. DOOLING, Judge.

"(Endorsed): Filed Nov. 26, 1915. W. B. Malink, Clerk.

"By C. W. Calbreath, Deputy Clerk." (Italics ours.)

(Transcript of Record, pp. 14-15.)

The demurrer to the petition for a writ of *habeas corpus* having been overruled, the appellant filed a return to the writ. After a hearing thereon, the learned Judge of the court below decided:

"The return to the writ of *habeas corpus* herein presents no question either of law or of fact that was not urged and considered upon the demurrer to the petition. I am satisfied with the conclu-

sions reached at that time, and it is therefore ordered that petitioner be discharged.

"January 13th, 1916.

"M. T. DOOLING,
"Judge."

(Transcript of Record, p. 31.)

Before answering appellant's brief, it is proper to state that another appeal, now pending before this Honorable Court in case No. 2812, *Joseph B. Katz, appellant, v. Commissioner of Immigration at the Port of San Francisco, California, appellee*, is a companion case.

Joseph B. Katz and the appellee in this case, Harry Katz, are brothers. Two separate warrants of arrest were issued against them, as well as two separate warrants of deportation. Separate affidavits claimed to support the warrants of arrest were issued against each of the brothers and separate preliminary hearings before the Immigration Officers were held as to each brother and thereafter the hearings of each brother were separately conducted until the hearing held on SEPTEMBER 2, 1914, when the evidence or alleged evidence against both brothers was jointly presented and the affidavits and other alleged evidence made applicable to both insofar as the context and tenor of the affidavits and other alleged evidence, upon their face, applied to both brothers.

Substantially the same so-called evidence was introduced against both brothers.

Joseph Katz was ordered deported, and the Court below affirmed this order *solely and only* for the reason that he admitted that he owned the house and

land, which was used as a place of ill-fame; that he was the landlord and Nellie White the tenant, that is, that the only relation that existed between them was that of landlord and tenant; and that he received a monthly rental of \$25, which was a reasonable rent, and received said sum only for rent as landlord and *in no other capacity*. Proof that Joseph Katz was otherwise interested in this house of prostitution was equally as glaringly deficient as it was against his brother Harry Katz, who, as we have seen, was ordered discharged on *habeas corpus* by the learned Judge of the Court below because of the insufficiency of the evidence.

So that, we perceive that Joseph Katz was held subject to deportation purely on a question of law, which is, Does Section 3 of the Act of February 20, 1907 (34 Stats. 898), as amended by the Act of March 26, 1910 (36 Stats. 263), apply to alien landlords who receive money from prostitutes *simply and only* as rent and *in no other capacity or relation*? This question is somewhat elaborately discussed by us in our Opening Brief on behalf of appellant Joseph B. Katz, filed in case No. 2812, now pending before this Court.

This question of law does not arise on the present appeal, as it is conceded that Harry Katz does not own the house and lot which was rented by Nellie White and used by her as a house of prostitution.

However, the warrant of arrest charges the appellee with having "been found connected with the management of a house of prostitution; and that he has been

found receiving, sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes." (Transcript of Record, p. 12.) He was ordered deported on the same charges.

Note: Respondent's Exhibit "A" is poorly numbered. The numbers seem to begin from the *last*, not the first, page.

There is absolutely not a scintilla of legitimate or competent evidence to uphold any such charges or any order of deportation based on such accusations.

The application for the warrant of arrest for Harry Katz (who is a chiropodist at Sacramento, California, and has not resided in Colfax for many years) is dated March 10, 1914. The warrant of arrest against Harry Katz is dated March 18, 1914. The secret or preliminary hearing before Examining Inspector D. J. Griffiths was held April 14, 1914, at Angel Island, California. The first regular hearing, by which we mean, a hearing at which the counsel of Harry Katz were permitted to be present, was held May 8, 1914. The second regular hearing of the charges made against Harry Katz was held on June 19, 1914, at Angel Island, California. The third and final hearing of the charges made against Harry Katz was held on September 2, 1914, at Angel Island, California. At this third and final hearing, the charges against his brother, Joseph Katz, were jointly heard, as the record discloses.

This preliminary explanation is made to avoid confusion to the Court and to opposing counsel in view

of the voluminous records attached to the petition for a writ of *habeas corpus*.

The attempted proofs endeavor to fix the place of the alleged commission of these two charges at Colfax, California.

It is most significant, in this connection, that Harry Katz has not lived in Colfax *since 1909 or 1910*. (See his statement at the secret or preliminary examination held April 14, 1914, Exhibit L, p. 12.)

The warrant of deportation against Harry Katz is based upon the same grounds as those contained in the warrant of arrest. (See Exhibit "VVV," p. 111.)

The petition for a writ of *habeas corpus* in behalf of Harry Katz and the arguments in support thereof were based upon three grounds:

First: ABSOLUTE INSUFFICIENCY OF ANY ALLEGED EVIDENCE, EITHER IN FACT OR IN LAW, TO SUPPORT THE WARRANT OF DEPORTATION.

Second: THAT THE AMENDATORY ACT OF MARCH 26, 1910, IS NOT RETROACTIVE, AND THAT ASSUMING, WHICH WE MOST STOUTLY DENY, THAT HARRY KATZ HAD ANYTHING WHATEVER TO DO WITH THE MANAGEMENT OF A HOUSE OF PROSTITUTION BEYOND BEING MERELY THE LANDLORD OF THE PREMISES, HIS ACTS IN THAT RESPECT ARE BARRED AND HE CANNOT BE DEPORTED IN THE YEAR 1915 FOR SOMETHING DONE BY HIM, AS SUCH LANDLORD OR IN ANY OTHER CAPACITY,

IN THE YEAR 1909, AND PREVIOUS TO THE ENACTMENT OF THE ACT OF CONGRESS OF MARCH 26, 1910.

Third: UNFAIRNESS OF HEARING IN MANY PARTICULARS.

The record is devoid of a single affidavit from any of the unfortunate inmates of the place rented by Joseph B. Katz, appellee's brother, to Nellie White. Not a single woman is produced, not a single affidavit is obtained and submitted in the record in which any of the inmates ever complained that either Joseph B. Katz or Harry Katz ever, at any time, or place, whether in Colfax or elsewhere, received, or shared in, or derived the slightest benefit from her earnings as a prostitute.

There is an entire absence of any direct evidence against either of the two brothers to sustain any of the charges preferred against them in the warrants of arrest.

In the absence of any direct evidence against either of these two brothers, an heroic effort was made by a number of the good women and men of Colfax to rid that place of the house of prostitution run by Nellie White and rented from Joseph B. Katz, by preferring charges against both the Katz brothers to the immigration officials, charges admittedly based upon information and belief and endeavoring to deport the Katz brothers upon information and belief, hearsay, opinions, conclusions, surmises and conjectures; in other words, producing anything and everything ex-

cept competent and legitimate evidence. An examination of the records before the immigration officials will bear out the truth of what we herein maintain.

Our contentions necessarily require an examination of the affidavits and other matters submitted to, and by, the Immigration Officials, in their recommendation and report to the Secretary of Labor, asking for warrants of deportation against the Katz brothers.

In order to assist the Court as well as opposing counsel, we prepared quite a comprehensive index of the numerous exhibits and other documentary matters appended to the petition for a writ of *habeas corpus* and minutely identified them for purposes of convenience, as Exhibits "A" to "BBB". (See Transcript of Record, p. 12.) These exhibits were transmitted in their original form to the Clerk's office of this Appellate Tribunal.

Counsel for appellant appended to their Return to the Petition for a writ of *habeas corpus* what purports to be a "record known as the 'Immigration Record in the Matter of Harry Katz on *habeas corpus*,' and numbered 53,770." (Respondent's Exhibit "A"; also called "Immigration Record.")

Insofar as this official record—respondent's Exhibit "A"—purports to contain full, true and correct documents, or copies thereof, of the numerous exhibits appended and attached to the petition for a writ of *habeas corpus*, numbered from "A" to "BBB", it is unobjectionable, but if it contain any secret reports, private official correspondence between the officials at Washington and at Angel Island or other

documentary matters never submitted or disclosed to the appellee or to his attorneys, it is, in that respect and to that extent, objectionable and a violation of that full and fair hearing which the law of the land and the rules of the Department of Labor are designed to enforce. Having this situation in view, and to fully protect the rights of appellee, the Traverse, filed by the appellee, to the Return to the writ of *habeas corpus*, specifically set forth as follows:

“And, further answering said Return and what purports to be a full and complete transcript of all of the proceeding had before the Immigration Department in a record known as the ‘Immigration Record, in the Matter of Harry Katz on *Habeas Corpus*,’ and numbered 53,770, and appended to and made a part of said Return, your petitioner states that if it should appear that said record above referred to contains any further, additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the various officers of the Immigration Service, and any other papers, memoranda or data, other than those contained and set out in the various exhibits appended to the petition for a writ of *habeas corpus* then that said further additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the various officers of the Immigration Service, and any other papers, memoranda or data, were never disclosed or exhibited until up to the present time to said petitioner or to his attorneys or any of them, nor was said petitioner or any of his attorneys ever informed or apprised, either directly or indirectly, of the existence, nature or contents of any such further, additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the vari-

ous officers of the Immigration Service, and any other papers, memoranda or data, other than those contained and set out in the various exhibits attached to the petition for a writ of *habeas corpus*, and said petitioner did not have, nor any of his attorneys, any opportunity to defend against such further, additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the various officers of the Immigration Service, or any other papers, memoranda or data, and to refute and to present proofs against the same, and, in this respect, your petitioner through his said attorney, avers that said hearing or pretended hearing or trial was unfair and in violation of law and of the constitutional rights and guaranties accorded to this petitioner, in consideration of which he is entitled to his discharge by the writ of *habeas corpus*."

(Transcript of Record, pp. 28-30.)

The record of the proceedings had before the Immigration Officials, *and appellant is bound by his own records*, discloses just what documents, affidavits and other papers were disclosed and shown to appellee and to his attorneys, upon which he was given an opportunity to present his defense thereto. These are as follows:

See proceedings before Examining Inspector Griffiths held on May 8, 1914 (Respondent's Exhibit "A", p. 106), which show:

"ATTORNEY WOODWORTH: I desire, if that comports with your views, Mr. Inspector, to proceed with the case against Harry Katz. In that case we desire the record to show that we have been furnished with a copy of the application for

warrant for Harry Katz, alias Dr. H. H. Katz, and also with copies of the following affidavits: Affidavit of Mame L. Schoonover dated March 6, 1914, and taken at the City of Colfax, Cal.; also copy of affidavit of Jeannie Kendall Lobner; also copy of affidavit of Mary Hanson; also copy of affidavit of Lucy F. Peers; also copy of affidavit of Mrs. Minnie Gertrude Williams; also copy of affidavit of Emma McMullen; also copy of affidavit of Rosa A. Honn; also given copy of warrant of arrest against Harry Katz. We understand that these affidavits were used in support of application for warrant, the affidavits being dated March 6, 1914, and application for warrant dated March 10, 1914. As against these affidavits, which, as is the case with the affidavits presented against Joseph Katz, we make the same observation that they appear to be based *on information and belief of affiants*, and that they do not purport to state any facts within the personal knowledge of the affiants; that if the view we entertain of the character of these affidavits be that taken by the examining inspector; we are satisfied to proceed with counter affidavits, otherwise we respectfully ask for the production of these witnesses that they may be cross-examined, because we are satisfied they know nothing of their own personal knowledge—*only based on information and belief*.

“INSPECTOR GRIFFITHS: *That is all. Based upon information and belief.*

“ATTORNEY WOODWORTH: We now present the following affidavits on behalf of Dr. H. H. Katz; affidavit of Samuel Aaron, resident of the City of Stockton. All these affidavits are presented in duplicate and I ask that they be properly marked and identified. Affidavit of M. Briscoe, also a resident of Stockton; affidavit of Ray Friedberger, also a resident of Stockton, Cal.; affidavits of Dr. W. W. Stockwell, also a resident of Stockton, Cal.; affidavits of Dayton D. Davenport, also a resident of Stockton, Cal.; the affidavits of Valen-

tine Schroeder, a resident of the City of Sacramento, Cal.; affidavits of G. Steinman, resident of the City of Sacramento, Cal.; affidavit of Philip Asher, resident of the City of Sacramento, Cal.; affidavit of Frank S. Gray, also a resident of the City of Sacramento, Cal.; affidavit of M. Samuel, also a resident of the City of Sacramento, Cal.; affidavit of B. Gallagher, also a resident of the City of Sacramento, Cal.; affidavit of E. M. Brown, also a resident of City of Sacramento, Cal.; affidavit of H. F. Holmshaw, also a resident of the City of Sacramento, Cal.; affidavit of Cyrus Deckelman, also a resident of the City of Sacramento, Cal.; affidavit of Mark Harrison, also a resident of the City of Sacramento, Cal.; affidavit of John G. Pendergast, also a resident of the City of Sacramento, Cal.; affidavit of J. C. Furness, a resident of the City and County of San Francisco, Cal.; affidavit of Ted Lunstedt, also a resident of the City and County of San Francisco; affidavit of C. L. Scharff, also a resident of the City and County of San Francisco, Cal.; affidavit of Adolph Hess, resident of the City and County of San Francisco, Cal.; affidavit of A. M. Walthers, also a resident of the City and County of San Francisco, Cal. All of these affidavits go to the good character of Dr. H. H. Katz, and that there is no foundation for the accusation on which his deportation is sought, and a supplemental affidavit of Harry Katz, alias Dr. H. H. Katz, in which he denies *in toto* any matters alleged against him and on which it is sought to deport him. These are all the affidavits and evidence we have to present at this time unless there be some other evidence you have in your possession which we have not been apprised of.

"INSPECTOR GRIFFITHS: In relation to the case of Dr. H. H. Katz, we have to offer an affidavit which has been filed at this office signed by Frank Schillinger.

"ATTORNEY WOODWORTH: This is the first notice we have had of this affidavit and if it comports with your views, we would like to have a copy of it and an opportunity to meet it.

"INSPECTOR GRIFFITHS: (The attorney will be allowed to read the affidavit at this time and a copy will be furnished later.)

"ATTORNEY WOODWORTH: I have read the affidavit and inasmuch as it seems to import new matter into the case, I respectfully ask time in which to confer with my client and, if possible, meet the facts contained in this affidavit. I now ask whether you have any other evidence outside of this affidavit?

"INSPECTOR GRIFFITHS: We have received no other evidence up to date.

"ATTORNEY WOODWORTH: How much time will I be allowed to file briefs in the Joseph Katz case and also make further showing in Dr. Katz case?

"INSPECTOR GRIFFITHS: For the information of the attorney I desire to state that we expect to have more affidavits in both these cases against Joseph Katz and Dr. Katz, and that he will be given time until May 22d (two weeks). We will advise you on receipt of further evidence."

In the proceedings before Examining Inspector Griffiths on June 19, 1914 (Respondent's Exhibit "A", p. 37a, the following additional affidavits and papers were offered against the appellee:

"MR. WOODWORTH: Since the last hearing I have received from the Examining Inspector a number of affidavits, which affidavits are as follows: The affidavit of Frank Schillinger; the affidavit of Fergus Graham Irving; the affidavit of Charles W. Hanson; the affidavit of Harvey L. Wolfson; the affidavit of Jeannie Kendall Lobner; the affidavit of Minnie G. Williams; the

affidavit of J. T. Taylor; the affidavit of William J. Carter; the affidavit of Charles H. Hill, a resident of New York; the affidavit of L. F. S. Peers, made May 29, 1914; the lady who seems to be the secretary of the Committee of Fifteen. I have also received what purports to be a certified copy of the record of proceedings had five years ago in a case pending in the Justices' Court in Colfax, and I have also received a copy of a brief by Attorney Cornish and also a copy of the report and recommendation of the Examining Inspector, Mr. Griffiths, to the Commissioner of Immigration. This, I believe, constitutes all the evidence that has been submitted to us since the last hearing. That is all the evidence you have, as I understand it, at the present time against Dr. H. H. Katz.

"INSPECTOR: Yes, sir."

In the proceedings before Examining Inspector Ainsworth, held on September 2, 1914 (Respondent's Exhibit "A", p. 141), the following additional affidavits and papers were offered against the appellee:

"EXAMINING INSPECTOR AINSWORTH: This is a continuation of the hearing in the case of Katz brothers, who have been arrested, Harry under warrant No. 53770/202 dated March 18, 1914, and Joseph, under Departmental warrant No. 53770/141 dated February 26, 1914. Mr. Woodworth appears for the purpose of meeting the additional showing which has been made in the case consisting of affidavits. Mr. Woodworth, will you please proceed?

"ATTORNEY WOODWORTH: Please understand that the showing we now make is made on behalf of both Dr. H. H. Katz and Joseph B. Katz. I make this observation so that it will obviate unnecessary repetition although the warrants were issued at different times and bear different numbers. I take it that the two cases are practically

combined in one for the purposes of this additional hearing. This additional hearing was ordered by the Department for the purpose of securing additional evidence against the Katz brothers but my understanding was and is that this additional investigation and evidence was directed chiefly to the production of evidence as to who purchased the furniture in the objectionable place. However, the evidence now offered as the additional evidence and the further showing made discloses that the examination has taken a much wider range. We desire to state that since the submission of the last hearings in addition to the affidavits and evidence furnished against the Katz brothers at that time, and which have been specifically enumerated in the hearings held on June 19, 1914, and on May 8, 1914, the following evidence constitutes the additional evidence presented against the Katz brothers, to-wit: Affidavit of Robert A. Peers, dated August 10, 1914; affidavit of Lucy F. Peers, his wife, dated July 31, 1914; affidavit of Jeannie K. Lobner, dated July 31, 1914; affidavit of Minnie G. Williams dated July 20, 1914, and another affidavit of Minnie G. Williams dated August 1, 1914, which also seems to be in the nature of a brief. A letter to the Honorable Secretary of Labor dated July 29, 1914, and purported to be signed by a number of citizens of Colfax demanding the deportation of the Katz brothers; a brief by Frank V. Cornish, City Attorney of Berkeley, California, dated August 18, 1914, and affidavit of Edward H. Honn dated August 1, 1914, and we have also been shown assessment list of 1914. There has been furnished to us a copy of a report by D. J. Griffiths, Immigrant Inspector, dated July 23, 1914, addressed to the Honorable Commissioner of Immigration purporting to contain a result of his investigations as to whether or not the objectionable place was furnished by either of the Katz brothers.

"INSPECTOR AINSWORTH: Allow me to interrupt you there, Mr. Woodworth. In your enumeration of additional evidence you refer to a letter from Frank V. Cornish and I want to ask you if you have a document that was attached to that letter.

"ATTORNEY WOODWORTH: Yes, sir. It is also in the nature of a brief."

Therefore, the record of the proceedings before the Immigration Officers disclosed just what affidavits, documents, letters and other papers were shown to the appellee and his attorneys, which they were given an opportunity to meet and refute.

Manifestly, if respondent's Exhibit "A," claimed to be the official record of the Immigration Officials, contain other affidavits, private reports, correspondence, which were used against the appellee in obtaining the warrant of deportation, but which was never shown or exhibited to him or his attorneys, this Court will take that fact into consideration and will not consider the same and will hold that the appellee did not get a fair and full hearing and that the order of deportation was arbitrary and unfair and subject to judicial inquiry. (Language of this Court in *Backus v. Owe Sam Gow*, 235 Fed. Rep. 847, 853-4.)

We proceed with a consideration of the alleged evidence against the appellee.

The application for the warrant of arrest was made on March 10, 1914. (See Exhibit "B," p. 2.) This application refers to certain affidavits theretofore made on March 6, 1914, four days previous to the application, by nine of the good ladies of

Colfax. These nine affidavits are all substantially the same and seem to be carbon copies one of the other. (See Exhibits "C," "D," "E," "F," "G," "H," "I," "J," "K," pp. 3-11.)

They are all based, confessedly, on "information and belief." This fact was admitted and conceded by Examining Inspector Griffiths at the first regular hearing held at Angel Island, Cal., on May 8, 1914. (See Exhibit "M," pp. 18-19.)

Furthermore, these nine "information and belief" affidavits, aside from being valueless as competent and legitimate evidence against Harry Katz, were incompetent and inadmissible upon the hearings against Harry Katz, under the doctrine laid down in the case of *Hanges v. Whitfield*, 209 Fed. Rep. 675. This authority distinctly holds that, under the provisions of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, which authorize the arrest and deportation of aliens who have lawfully entered the United States for certain causes subsequently arising, *ex parte* affidavits and other documentary evidence may be taken *preliminary to, and as a basis for, an application* for a warrant for the arrest of an alien so charged, but such affidavits *can not be again used as evidence against him on his hearing after arrest*, at which he is entitled to be represented by counsel and to cross-examine the witnesses against him.

The opinion in that case will be found to be very instructive and it considers in detail the right of aliens

arrested to be deported for causes arising subsequent to their entry into the United States.

After calling attention to the Immigration rules of November 15, 1911, especially Rule 22 and the subdivisions thereof, which prescribe the procedure to be followed in deportation hearings, the learned Judge in that case says:

“Testimony may, no doubt, be taken in the form of affidavits, *or otherwise*, preliminary to, and as a basis for, an application for warrants of arrest of specified aliens when the Immigration Officers are credibly informed, or have good reasons to believe, that such aliens are unlawfully within the United States. But is the testimony so taken upon the preliminary hearing, even when lawfully taken, admissible against the aliens upon the hearing required to be given them after warrants for their arrest have been issued, to determine whether or not they shall be deported?

* * * It is incumbent upon the Government to establish by *competent evidence* that the petitioners or some of them had violated all or some of the provisions of the Immigration Act as so amended after they were admitted to the United States and prior to their arrest. True, the proceeding for this purpose may be summary, and before an executive, or other authorized, official of the Government; but it must be a *lawful proceeding*, the charge established by *competent evidence*, and the aliens afforded a *fair hearing and opportunity to discredit or disprove the evidence adduced against them*. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, *with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration in determining whether or not they should be deported*.

"The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact; and it is indispensable in all judicial proceedings in this country, civil or criminal, that *ex parte* testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceeding to the party whom it is proposed to be used to cross-examine the witnesses giving such testimony, *cannot rightly be used against him*. 1 Greenl. Ev. (16th Ed.), 447; 2 Wigmore on Ev., 1361, 1365.

"In this case, it appears without dispute that the petitioners were not informed at any time of their right to counsel until *after* the inspector had taken the *ex parte* affidavits and examined the petitioners at length, when at the close of such examination he asked each, 'if he desired counsel.' Upon each answering that he did, the inspector then fixed a time for the further hearing and postponed it accordingly. At such further hearing, counsel for the petitioners requested of the Inspector that the witnesses whose *ex parte* affidavits or statements had been previously taken be recalled that they might be cross-examined, which requests the Inspector denied. Some of the witnesses whose statements were taken by the Inspector were called by the petitioners but refused to testify unless the Inspector would so request, which request he refused to make. Others of the affiants the petitioners could not procure. *They were thus prevented from obtaining their testimony either upon direct or cross-examination. True, the petitioners and their counsel were permitted to examine the record, or copy of the testimony taken by the Inspector prior to the application for the warrant of arrest; but of what avail was that?* That testimony had already been forwarded to the Bureau of Immigration, and an

inspection of the record kept by the Inspector would only enable them to read what he had written, without opportunity to test its truthfulness by legitimate cross-examination or otherwise. *That such testimony is legally admissible in any proceeding in which it is sought to deprive any person, citizen or alien, of his personal or property rights, cannot be successfully maintained.*

"It is contended on behalf of the Inspector that he is authorized under Rule 22 of the Bureau of Immigration to arrest and examine the petitioners after the warrant for their arrest was issued, without informing them of their right to counsel, and to deny to them the right upon the hearing required to be given them until such time as he may see fit to thereafter permit them to have counsel. If that is the effect of the rule, *it is inconsistent with the usual and uniform procedure in all judicial proceedings under the laws of the United States where in it is sought to deprive persons lawfully therein of their personal and property rights, and but emphasizes the necessity of Immigration Officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported except upon legal evidence, which establishes with reasonable certainty, at least, the charges upon which it is sought to deport them.*"

This case was affirmed by the Circuit Court of Appeals. *Whitfield v. Hanges*, 222 Fed. 475.

See, also, the well-considered case of *Ex parte Lam Pui*, a decision by District Judge Connor, 217 Fed. Rep. 456.

Among other rules of law ably discussed by the learned Judge, applicable to deportation proceedings, are the following:

"Text-writers and judges have undertaken to

define the word 'evidence,' as applicable to judicial investigation, with more or less success. Probably no more satisfactory definition is found, for practical purposes, than that given by Mr. Edward Livingstone:

"'Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.' Draft, Code.

"It is elementary that in judicial proceedings the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. *It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue.* The industry of counsel affords a number of illustrative expressions of courts. In *People v. Van Zile*, 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:

"'Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.'

"Judge Caldwell, in *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, well says:

"'The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.'

"It may be that, upon a full, fair hearing, in which petitioner has the benefit of counsel, and all of his rights secured to him, the government will be able to establish the charge made against him. I am of the opinion that such a hearing has not been had, and that no evidence has been adduced upon which the finding that petitioner procured his certificate by false and fraudulent representations can be sustained. These are the only questions presented upon this record.

"The petitioner is entitled to be discharged from custody. An order to that effect will be drawn."

Therefore, it is clear that these nine "information and belief" affidavits sworn to on March 6, 1914, at least twelve days before the issuance of the warrant of arrest against Harry Katz, do not constitute any evidence whatever against Harry Katz, and their admission against him, as a basis for the warrant of deportation, deprived him of that full and fair hearing required by the law and regulations of the Department of Labor. These nine affidavits must be, therefore, eliminated from consideration. Outside of these "information and belief" affidavits, there is no competent or legitimate evidence to sustain the warrant of deportation, as was held by the learned Judge of the court below.

It is significant that counsel for appellant do not venture to make the slightest allusion to these "nine information and belief" affidavits to support the warrant of deportation.

We now proceed, briefly, to a consideration of each one of the other affidavits and documents introduced against Harry Katz.

The next affidavit is that of Frank Schillinger. (Exhibit "JJ," p. 42, attached to petition for writ of *habeas corpus*; p. 101, Immigration Record.) Counsel for the appellant insert this affidavit in their brief (pp. 17-18) without any comment.

A reading of this affidavit shows that it relates to something that took place in the year 1909, or *one year before the enactment of the amendatory Act of Congress of March 26, 1910, under which it is now sought to deport appellee*. Furthermore, it relates to

an entirely different piece of property from that which his brother, Joseph Katz, now owns, or owned at the time of the issuance of the warrant of arrest against Joseph Katz. Again, this particular piece of property was sold by Harry Katz *several years ago*. *It is not the same property with reference to which the accusation is now made against Joseph Katz.*

That the penal provisions of the Act of March 26, 1910, amending the Act of February 20, 1907, do not operate retroactively would seem to be too clear for argument.

However, see

U. S. v. Tsuji Suckichi, 199 Fed. 750;
U. S. v. Heth, 3 Cranch. 399, 2 L. Ed. 479;
U. S. v. Int. Mer. Co., 204 Fed. 702;
U. S. v. North Ger. Llyd. S. S. Co., 185 Fed. 158;
U. S. v. North Ger. Llyd. S. S. Co., 186 Fed. 672;
Hackfield v. U. S., 197 U. S. 442;
Moffitt v. U. S., 128 Fed. 375.

Therefore, whatever happened on the part of Harry Katz previous to March 26, 1910, assuming that anything happened at all which would subject him, in the slightest degree, to deportation, is effectually barred and cannot now be brought up against him after the *lapse of six years*.

Aside from that, a record of proceedings in the local court at Colfax, concerning the very piece of real property and its use referred to in the affidavit of Frank Schillinger, shows conclusively that that particular piece of property was not used for any im-

moral purpose *after July 22, 1909*. (See Exhibit "TT," pp. 53-54.)

Also, see, the affidavit of George W. Hamilton, formerly District Attorney of Placer County, which completely demolishes any suggestion or surmise that either Harry Katz or Joseph Katz was ever found receiving, sharing in, or deriving benefit from the earnings of any prostitute, or that Harry Katz was ever connected with the management of a house of prostitution. (See Exhibit "MMM," p. 93; also Respondent's Exhibit "A," p. 174.) The affidavits of D. A. Russell and P. A. Crider, on behalf of H. H. Katz, support the testimony of Harry Katz. (Exhibits "AAA" and "BBB," pp. 71-72.)

The next affidavit is that of Fergus Graham Irving. (Exhibit "KK," p. 43, attached to petition for writ of *habeas corpus*, p. 97, Immigration Record; also set out in Appellant's Brief, pp. 27-28, without any remarks.) This affidavit, tested by all the established rules of evidence, is totally insufficient to base any deportation against Harry Katz. The statement, in the affidavit, that "he knows Nellie White by sight and has seen her at various times in the town of Colfax in the house of prostitution on the County road in the northern part of Colfax, *which house is owned and controlled by Katz brothers,*" is, clearly, the expression of a mere conclusion of the affiant. It is to be observed that this affiant is talking about the house owned by Joseph Katz, not the one previously owned by Harry Katz in 1909 and now long since disposed of.

JOSEPH KATZ SWEARS THAT HE ALONE OWNS THE HOUSE RENTED TO NELLIE WHITE AT THE TIME THE WARRANT OF ARREST WAS ISSUED AGAINST HIM IN MARCH, 1914, AND HE IS CORROBORATED BY HIS BROTHER, HARRY KATZ, WHO SWEARS THAT HE HAS NO INTEREST IN SAID PIECE OF REAL PROPERTY. THERE IS NO EVIDENCE TO IMPEACH THE TESTIMONY OF THESE TWO MEN, SAVE THE CONCLUSIONS, SURMISES OR CONJECTURES OF PERSONS WHOSE RASH AND IRRESPONSIBLE STATEMENTS UNDER OATH CANNOT BE ACCEPTED FOR ANY PURPOSE WHATEVER.

Further, this particular affidavit of Fergus Graham Irving goes on to say:

“That he has frequently seen Harry Katz during the last two years about said house of prostitution at different times of the day and that he SEEMED to be entertaining the female inmates of the house, and (SEEMED) to be superintending repairs and improvements about the house and grounds.”

The statement that he “SEEMED” is, confessedly, a mere conclusion or guess of the affiant and does not constitute evidence.

He does not say that he ever saw Harry Katz get a cent from any prostitute, which is the charge made against him as well as the accusation that he was connected with the management of a house of prostitution.

Furthermore, this affidavit was taken on April 25,

1914, at Colfax, California, a place 150 miles distant from San Francisco and Angel Island, where the deportation proceedings were being held, and it was taken without the slightest notice to appellee Harry Katz or to his attorneys. They were effectually deprived of the right of cross-examination. They demanded the production of this and other affidants, as soon as they were apprised of the existence of these affidavits, for the purposes of cross-examination, but this important substantial right was denied the appellee, Harry Katz. (See Exhibit "WW," pp. 63-64; Exhibit "CCC," pp. 73-74.)

This method of procedure on the part of the immigration officials deprived appellant of a fair and impartial trial, as is held in the cases of *Hanges v. Whitfield*, 209 Fed. 675, and *Ex parte Lam Pui*, 217 Fed. 456. (See Record of Proceedings, Exhibits "WW" and "CCC," pp. 63-64, 73-74.)

It is true that, after Examining Inspector Griffiths at the hearings held on June 19, 1914, as to both Katz brothers, had denied the request for the production of the affidants for the purposes of cross-examination, the Commission of Immigration saw fit, after the practical submission of the two cases, to address a letter to Marshall B. Woodworth, one of the attorneys for the Katz brothers, in the following vein:

"Sir:

"Referring to the case of Dr. H. H. Katz, arrested under Department Warrant No. 53770/202, dated March 18, 1914, and Joseph Katz, arrested under Department Warrant No. 53770/1414, dated February 26, 1914, charging that these

aliens have been found receiving, sharing in, or deriving benefits from the earnings of a prostitute or prostitutes, and in whose cases you demand that the witnesses be presented for the purpose of cross-examination by you, you are advised that there is no provision in the Immigration Law providing for the subpoenaing of witnesses. The case for the government is submitted on affidavits aside from the direct testimony of the Katz brothers, and you as attorney for the defense have the privilege of submitting your case in a similar manner." (See Exhibits "SSS," p. 100.)

It is respectfully submitted that this letter of apology and explanation from the Commissioner of Immigration affords no defense or excuse to the failure of the Immigration Officer to give the appellee an opportunity to cross-examine these hostile witnesses. Whatever may be the condition of the law, which does not provide for the compulsory production of witnesses, still the Commissioner of Immigration, as a mere matter of *fairness* to the appellee, was in duty bound to notify him that the affidavits or the testimony of such and such witness was to be taken at Colfax or some other place at a certain and appointed time so that the appellee could have had a legal representative there to cross-examine these witnesses, who were certainly hostile and prejudiced against appellee and his brother, Joseph Katz, as the record discloses.

In *Ex parte Ung King Seng*, 213 Fed. 119, it is held that a Chinese alien was not accorded a fair hearing before the Immigration Officers, where her counsel was precluded by the Inspector from putting any

questions on cross-examination to witnesses produced and examined against her.

Substantially the same wrong is done to the Katz brothers by the Immigration Officers when they give no notice whatever that witnesses are to be examined against them, and thus preclude their attorney from being present to cross-examine. Especially is this true where it appears that the appellee, on June 19, 1914, was led to believe that his case had been submitted and that there was no occasion for any further testimony against him. (See p. 37a, Immigration Record.)

Thereafter, appellee was notified that additional affidavits had been secured against him and this necessitated a third and a final hearing on September 2, 1914, at which additional affidavits and several documents and reports were introduced against him and his brother, without the slightest notice to them or to their attorneys of the fact that such affidavits would be taken and without the slightest opportunity to be present and cross-examine the affiants.

At this final hearing on September 2, 1914, the attorney for the appellee again raised the point that the affidavits should not be admitted against the appellee and his brother because of the fact that they had been given no notice of the taking of the affidavits and no opportunity to cross-examine the affiants. This objection was overruled. What transpired may be best stated by quoting from the record of the proceedings at the final hearing, held on September 2, 1914, at Angel Island, as follows:

"ATTORNEY WOODWORTH: Yes, sir. It is also in the nature of a brief. Now at this time, and in accordance with previous requests made by us which were denied, and for the purpose of protecting the rights of the Katz brothers should *habeas corpus* proceedings become necessary, we ask for the production of those people for the purpose of cross-examination.

"INSPECTOR AINSWORTH: I will say in reply to that, Mr. Woodworth, that this office has no means by which any of the witnesses may be produced here for your cross-examination, but this office has no objection to your going to those witnesses and obtaining any statements from them that they see proper to give you.

"ATTORNEY WOODWORTH: As this is the final hearing of this matter, and we desire to have the cases closed and as we do not consider that the affidavits contain any evidence worthy of the name—in other words, that the affidavits are based largely on hearsay, statements on information and belief, matters of opinion, and guess work on the part of the affiants, and as to repair to Colfax to cross-examine those witnesses at this late day would take much time and necessitate an expenditure of considerable money, we state that the offer now made and permission granted to cross-examine these witnesses is not of any practical value and we will submit the case on the evidence offered here, such as it is, claiming that it is not sufficient to show, in the first place that Dr. H. H. Katz at any time was found connected with the management of a house of prostitution, or that he was found receiving, sharing in, or deriving benefit from the earnings of a single prostitute. We call the attention of the Honorable Examining Inspector and the Honorable Commissioner of Immigration to the fact that the matters with reference to Dr. H. H. Katz really relate to something that happened about five years ago, at any rate, previous to the amendment of 1910, amend-

ment to the Act of February 20, 1907. As to his brother, Joseph Katz, we admit that he owned the land and the house at the time the warrant of arrest was issued against him, but we contend that there is no evidence to show that he was found connected with the management of a house of prostitution or that he was found receiving, shar-in, or deriving benefit from the earnings of a single prostitute. It is true that he received \$25 a month, but that was simply for the rent of the place and his relation to the place was simply that of landlord and tenant. In support of these two defendants we present the following affidavits, which we ask to be appropriately marked. They consist of affidavits presented in duplicate, those affidavits to be used in both cases, of Geo. W. Hamilton, District Attorney for the County of Placer, in which Colfax is situated, in which he completely demolishes, in our judgment, any semblance of evidence that may have been presented against the Katz brothers." (Exhibit "CCC," p. 74, attached to petition for writ of *habeas corpus*; p. 141, Immigration Record.)

The imperative necessity for some sort of a notice, to be given to the appellee, is obvious, especially if it be true that a compulsory production of the witnesses against an alien cannot be had by the Immigration Officers. Otherwise, what protection has an alien charged with deportation? The privilege of going perhaps a long ways to cross-examine a witness, and perhaps many days or months after he has given his direct examination, is no privilege at all and practically robs cross-examination of its principal virtue, viz.: that of an immediate examination of the adverse and hostile witness *at the time that he makes the adverse and inimical statements*. In the present case, one

of the witnesses, whose affidavit was produced against the petitioner Harry Katz at the hearing held on June 19, 1914, is one Charles H. Hill, *a resident of New York*. No notice whatever was given of the taking of this affidavit. And yet, under the permission given by the Commissioner of Immigration, both by letter above referred to and in his ruling at the hearing held on September 2, 1914, would counsel for the appellant have us believe that it would constitute a fair and full hearing to compel appellee Harry Katz and his attorney to go on a wild goose chase from California to New York to cross-examine Charles H. Hill, only to find, it may be, that he had left, or that he refused to be cross-examined? Would it not have comported more with an orderly and fair course of procedure to have notified the appellee that the deposition of Charles H. Hill, in New York, and the depositions of the other witnesses, at Colfax and elsewhere, would be taken at a certain time and place, so that appellee or his legal representative could be present to cross-examine, or to conduct the examination by interrogatories?

We cannot conceive how, under any aspect of the case presented to this Court, it can be claimed by the counsel for appellant that the appellee, or his brother, Joseph Katz, had a fair and full hearing in being denied the right of cross-examination of the various hostile and adverse witnesses produced against him, and without the slightest notice that their statement would be taken, a considerable portion of the statement being taken, without any notice to appellee

or his counsel, after it was announced that the cases had been closed and finally submitted for decision.

Hanges v. Whitfield, 209 Fed. 675;
Ex Parte Lam Pui, 217 Fed. 456;
Ex Parte Ung King Seng, 213 Fed. 119.

Passing to the next affidavit, that of Charles W. Hanson (Exhibit "LL," p. 44; appended to petition for writ of *habeas corpus*; p. 96, Immigration Record), (see also Appellant's Brief, pp. 39-41), it will be found that it relates to matters taking place in the year 1909, a period prior to the time when the Amendment Act of March 26, 1910, took effect. It purports to be a narration of some proceedings before Justice Kuenzley against Harry Katz, taking place in 1909. As the Act of March 26, 1910, is not retroactive, the affidavit of Charles W. Hanson, assuming, which we deny, that it establishes anything, relates to matters which are now barred and cannot be the subject of any deportation. There is nothing in his affidavit upon which any just or reasonable inference could be deduced that Harry Katz was connected with the management of the house of prostitution which Nellie White ran and the property of which, that is, the land, was owned by his brother Joseph Katz. It must be remembered that the property that Charles W. Hanson refers to, in 1909, is a different piece of property and not the same property now owned by Joseph Katz. There is nothing in this affidavit of Charles W. Hanson upon which to sustain any accusation that he was connected with the management of any house of prostitution or that he ever received

from any inmate of any house of prostitution any portion of her earnings in any way, shape or form. The mere fact that in 1909, he may have exercised acts of proprietorship in inspecting his real estate, supervising repairs and looking after the upkeep of his property, is not sufficient, in fact or law, to convict him of being connected with such a serious and odious charge as that of managing a house of prostitution or the more revolting accusation of receiving, sharing in, or deriving benefit from the earnings of a prostitute. It is a notorious fact, especially in the large city of San Francisco, that many alien and citizen property owners rent premises which are used for houses of ill-fame, and yet, up to this time, no immigration officer has ever attempted to arrest these alien property owners and attempted to deport them because of the rentals they receive simply in the capacity of landlords upon the theory that, in receiving their rents, they are in effect receiving, sharing in or deriving benefit from the earnings of prostitutes. Such an absurd attitude has as yet not been taken by the immigration officers. YET THAT IS PRACTICALLY THE POSITION THEY TAKE IN ISSUING WARRANTS OF DEPORTATION AGAINST THE KATZ BROTHERS UPON THE EVIDENCE PRESENTED, IF, INDEED, THE MATTERS PRESENTED CAN BE DIGNIFIED BY THE NAME OF EVIDENCE.

The same objections, as to deprivation of the right of cross-examination and no notice being given of the taking of the affidavit of Charles W. Hanson, and

the same arguments as to being thereby deprived of a fair and full hearing, may be urged as with other affidavits previously mentioned.

The next affidavit is that of Harvey L. Wolfsen (Exhibit "MM", p. 45, attached to petition for writ of *habeas corpus*; p. 94, Immigration Record), (see also Appellant's Brief, pp. 35-36). This affidavit is also totally insufficient to constitute competent or legitimate evidence to support any charge that Harry Katz was connected with the management of a house of prostitution or was found receiving, sharing in, or deriving any benefit from the earnings of a prostitute. He attempts to state: "That during the winter of 1912-1913, he has seen Dr. Harry H. Katz about the house APPARENTLY superintending the repairing. That he BELIEVES and is of the OPINION that the house referred to is owned by the Katz brothers, known as Joe and Harry." His belief and his opinion and what was "apparently" going on as to repairs certainly do not constitute competent or legitimate evidence. Furthermore, even if the house were owned by Harry and Joe Katz, how, in the name of common sense, would that fact justify the inference that either of them was connected with the management of a house of prostitution or that either of them was ever found receiving, sharing in, or deriving benefit from the earnings of a prostitute. Not a single one of the prostitutes was called upon to testify, in spite of the vigilance of the immigration inspector who went to the extreme, after investigating the situation at Colfax, to telegraph to Wash-

ington, D. C., for a telegraphic warrant of arrest for Joseph Katz, ignoring for the time being Harry Katz. Not a single man or woman testifies directly or indirectly that Harry Katz was connected with the management of any house of prostitution. In fact, after 1909, Harry Katz had nothing whatever to do as landlord of any premises in Colfax rented for immoral purposes. There is not a single shred of evidence that Harry Katz ever received or shared in or derived any benefit from the earnings of any prostitute.

The same objections, as to deprivation of the right of cross-examination and no notice being given of the taking of the affidavit of Harvey L. Wolfson, and the same arguments as to being thereby deprived of a fair and full hearing, may be urged as with other affidavits previously mentioned.

The next affidavit, that of Robert F. Pottol (Exhibit "MMa", p. 45½, attached to petition for writ of *habeas corpus*; p. 79, Immigration Record), (see appellant's opening brief, pp. 32-33), establishes nothing and relates simply as to the character of the house run by Nellie White. There is no dispute about the fact that Nellie White ran a place of ill-fame. There is no dispute about the fact that she rented the place from Joseph Katz, who was her landlord. There is no evidence that Harry Katz was landlord or had the slightest interest in the place except possibly as a brother of Joseph Katz. Joseph Katz swears that he was the sole owner of the land and house. No one contradicts him. Harry Katz swears that he had no interest in the land and house rented by his brother

Joseph Katz to Nellie White. No one contradicts him. As was well said in *Ex parte Lam Pui*, 217 Fed. 456-467: "It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue."

There is no evidence at all against Harry Katz except suspicion, conjecture, speculation, information and belief, opinion, etc.

As to the next affidavit, that of Jeannie K. Lobner (Exhibit "NN", p. 46, attached to petition for writ of *habeas corpus*; p. 81, Immigration Record), (see appellant's opening brief, pp. 34-35), which is similar in its purport with that of Robert F. Pottol, just referred to (Exhibit "MMA", p. 45½), the same may be said as of that of Robert F. Pottol.

Also the same arguments as to deprivation of right to cross-examine and the fact that no notice whatever was given of the taking of the affidavit are advanced as to the Robert F. Pottol and Jeannie K. Lobner affidavits, just referred to.

The next affidavit is that of Minnie G. Williams (Exhibit "OO," p. 47, attached to petition for writ of *habeas corpus*; p. 94x of Immigration Record), (see appellants' Opening Brief, pp. 36-39.) This lady also gave an affidavit in support of the application for the warrant of arrest which has been previously referred to as one of the nine "information and belief" affidavits sworn to before the warrant of arrest was issued. (See Exhibit "L", attached to petition for writ of *habeas corpus*.)

This second affidavit of Minnie G. Williams is also sadly lacking in merit as evidence. She states that: "It is the *firm belief* of the *affiant* that the aforesaid house, occupied by Nellie White, was the headquarters of Harry H. Katz whenever he was in Colfax." But such "firm belief" is not evidence. Even if it were, that fact does not establish that Harry Katz was connected with the management of a house of prostitution or that he ever received, shared in, or derived any benefit whatever from the slightest earnings of a prostitute.

Her statements, in this affidavit, that lumber bills were made out at times in the name of Harry Katz does not establish that Harry Katz is connected with the management of a house of prostitution or that he received or shared in or derived benefit from the earnings of a prostitute. Such fact does not establish anything derogatory to either Harry Katz or Joseph Katz. The statement: "The affiant has been in a position to observe many times Joe Katz and Harry Katz in conference with each other, discussing legal looking documents," is so absurd that it deserves but to be mentioned to be condemned. The further statement that: "The Katz brothers were, to all appearances, a close corporation in their business affairs," is nothing more than the mere absurd conclusion of the affiant. Even if they were a "close corporation in their business affairs," how does such absurd statement sustain the serious charge that Harry Katz was connected with the management of a house of prostitution or that he ever in one single instance received,

shared in, or derived benefit from any earnings of a prostitute. Not a single man or woman testifies *directly* in support of such charges. It is significant that no policeman, or constable, or other law officers in Colfax testify to such charges or to such a state of facts from which the deduction or inference might legitimately and fairly be drawn that Harry Katz was connected with the management of the place run by Nellie White or ever received any of the earnings of any prostitute. Not a single one of the inmates was called to testify to such state of facts.

The same objection is urged, as to this affiant, as to the unfairness of the hearing in not being permitted to cross-examine affiant and in not being notified of the taking of her second affidavit.

The next affidavit is that of J. T. Taylor (Exhibit "PP", p. 48, attached to petition for writ of *habeas corpus*; see p. 80, Immigration Record; see appellant's opening brief, pp. 33-34). His affidavit is also totally insufficient. He testifies to the erection of the house owned by Joseph Katz some five years ago and testifies: "That during the erection of said house he frequently saw Harry H. Katz superintending and directing about the place and acting in a manner indicating *proprietorship*." This is nothing more than a statement of a mere conclusion. Even assuming it to be true, the fact that Harry Katz superintended and directed the erection of his brother's house is no evidence, in fact or law, that he was connected with the management of a house of prostitution or ever received any earnings of a prostitute.

The same objection is urged, as to this affiant, as to the unfairness of the hearing in not being permitted to cross-examine affiant and in not being notified of the taking of the affidavit.

The next affidavit is that of William J. Carter (Exhibit "QQ", p. 49, attached to petition for writ of *habeas corpus*; p. 95, Immigration Record). This affidavit is subject to the same infirmity as all the others. It does not purport to state facts, but mere opinion or belief. He says: "That it was reputed to be the property of Katz brothers." This is a mere conclusion of affiant and certainly hearsay.

The same objection is urged, as to this affiant, as to the unfairness of the hearing in not being permitted to cross-examine affiant and in not being notified of the taking of the affidavit.

The next affidavit is that of Charles H. Hill (Exhibit "RR", p. 50, attached to petition for writ of *habeas corpus*; pp. 77-78, Immigration Record; see appellant's opening brief, pp. 10-12). This gentleman was a resident of New York at the time of giving his affidavit. There was certainly no opportunity to cross-examine him except by going to New York. No notice whatever of the taking of his affidavit was given the appellee and he knew nothing about it until it was actually used against him. The affiant alludes to things that happened in 1909. As we have stated, the Act of March 26, 1910, is not retroactive, assuming that Harry Katz did anything in 1909, which we deny, which would subject him to deportation. He states: "*That to the best of his knowl-*

edge and belief the said Harry Katz conducted the said house, known generally to the people of Colfax as a house of prostitution." It is respectfully submitted that the mere belief of the affiant Hill is not legitimate evidence, but, aside from that, he admits that he has not lived in Colfax since April, 1910, and his statements are with reference to matters which transpired in 1909, previous to the passage of the Act of March 26, 1910.

We have already alluded to the inability to cross-examine the affiant Hill and to the fact that no notice whatever was given as to the taking of his affidavit, whereby we might have prepared, forwarded and plied him with cross-interrogatories.

The next document, purporting to be a sworn affidavit, is that of Lucy F. S. Peers (Exhibit "SS", p. 51, attached to petition for writ of *habeas corpus*; pp. 75, 76, Immigration Record; see appellant's opening brief, pp. 2-5.) This is a most curious document, introduced against Harry Katz and Joseph Katz, under the guise of a sworn affidavit. It purports to be signed and sworn to by "L. F. S. Peers, Secretary of the Committee of Fifteen." It violates all the rules of evidence and purports to be in the nature of a report, by the Secretary of the Committee of Fifteen, of efforts to stamp out houses of prostitution in Colfax. It contains nothing more than matters of hearsay, information and belief, and other rash and irresponsible statements unworthy of the name of evidence. A mere reading of this so-called affidavit will convince this Court of its worthlessness. This alleged affidavit

is really "hearsay of hearsay". It concludes: "The above facts were collected by the Committee of Fifteen—composed of women who have undertaken to rid their community of the houses of prostitution—and it has authorized its Secretary to sign the same before a Notary Public." Therefore, the Committee of Fifteen first collected facts, so called, and then told these facts to its Secretary and its Secretary collated these facts in her sworn affidavit, one of the affidavits upon which it is sought to deport both Harry Katz and Joseph Katz.

One of the statements made by Mrs. L. F. Peers is:

"The immigration service was notified and Mr. Griffiths came to Colfax to investigate the matter. *The inmates of the redlight district were brought into court and examined by Mr. Griffiths.*" (Exhibit "SS", p. 51.)

Although the inmates were examined by Immigration Inspector Griffiths in court, not a single one ventures to say that Harry Katz had anything to do with the management of the place run by Nellie White or that Harry Katz or his brother Joseph Katz ever received, or shared in, or derived any benefit whatsoever from the earnings of any of the inmates.

We make the further objection as to deprivation of right to cross-examine Mrs. L. F. S. Peers and the fact that no notice was given of the taking of this so-called affidavit, and the unfairness of the hearing in that respect.

The next document used against appellee, Harry

Katz, is what purports to be a certified copy or abstract of the proceedings in the case of the People of the State of California against Harry H. Katz (Exhibit "TT", p. 53, attached to petition for writ of *habeas corpus*; pp. 98-99, Immigration Record; see appellant's opening brief, pp. 13-17).

This record relates to occurrences up to July 22, 1909, a considerable period prior to the passage of the Amendatory Act of March 26, 1910. As already stated, the Act of March 26, 1910, is not retroactive. Furthermore, the abstract shows that:

"District Attorney Tuttle made a statement, that an understanding was had with the defendant and his attorney, that the house referred to in the complaint should not be used or let hereafter for immoral purposes, and with that purpose in view, and the consent and acquiescence of the complainant herein, he made a motion to dismiss this case; and in consideration of all the circumstances in the case, and the improbability of conviction of the defendant in the event of proceeding with the case to its close, on account of the bias of the jurors, the court dismissed the case, and discharged the jury, witnesses, and defendant." (Exhibit "TT", p. 54.)

It must be remembered that the house involved in the criminal proceedings in 1909 was disposed of by Harry Katz subsequent to July 22, 1909, and that it is not the same house owned by his brother Joseph Katz at the time of the arrest of Joseph Katz by the immigration authorities. The house owned by Harry Katz, on July 22, 1909, was in an entirely different part of town from that afterwards acquired and owned

exclusively by his brother, Joseph Katz. (See affidavits of H. H. Katz and Joseph B. Katz. Respondent's Exhibit "A", pp. 129, 128, 127, 126, 125.)

Furthermore the abstract of proceedings indicates that after July 22, 1909, the house owned by Harry Katz at that time was not used or let thereafter for immoral purposes. How this certified copy of abstract of proceedings is any evidence to support the charge against Harry Katz, that he was connected with the management of a house of prostitution, other merely than as landlord, or that he ever received, shared in, or derived any benefit from the earnings of any prostitute, in the sense undoubtedly intended by the Amendment Act of March 26, 1910, that is, that he received, or shared in, or derived benefit from the earnings of a prostitute in the character of a maquereau, is incomprehensible to us.

The next interesting document introduced and used against the appellee, Harry Katz, as well as against his brother, Joseph Katz, is what is entitled: "Statement of Counsel for Committee of Fifteen with Comments on Testimony Offered (Exhibit "TT", pp. 85-86-87-89, attached to petition for writ of *habeas corpus*; p. 74, Immigration Record.)

The statement is an argument presented by Frank V. Cornish, as attorney for Committee of Fifteen. What place it has in the hearings on the deportation proceedings against either Harry Katz or Joseph Katz we do not understand. It is not sworn to and contains many statements not established by witnesses under oath or with the benefit of cross-examination.

We charge that the use of such a document deprived both Harry Katz and Joseph Katz of a full and fair hearing, for the reason that the admission of such a document was clearly incompetent, irrelevant and immaterial, and did not constitute competent, or any, evidence. Furthermore, it deprived Harry Katz and Joseph Katz of full and fair hearings for the reason that nowhere in the immigration laws or in the rules established "not inconsistent with law" is there any provision for the appearance of special and private counsel to prosecute aliens charged with deportation offenses. Furthermore, the admission of such a "Statement of Counsel for Committee of Fifteen with Comments on Testimony Offered", containing, as it does, a vicious and unprovoked attack upon the appellee, must have influenced the Commissioner of Immigration and the Secretary of Labor in their recommendation and determination, respectively, to issue warrants of deportation against the appellee, and the partisanship and bias and prejudice of the good ladies of Colfax composing the Committee of Fifteen and of their learned and able attorney could not but fail to create an impression, in the minds of Examining Inspector Griffiths and Examining Inspector Ainsworth and Commissioner of Immigration Backus and of the various officials connected with the Department of Labor in Washington, in issuing the warrants of deportation, unfavorable to the appellee. Such documents, and such tactics, permitted by the immigration officials, to be used against the appellee, undoubtedly prevented him from having that full, fair

and impartial hearing which the laws of this country guarantee to the meanest and humblest person. We think that further argument, as to the inadmissibility of the document referred to and the deep prejudice it must have created against the appellee, thereby depriving him of a fair and impartial hearing, is unnecessary and superfluous.

The next document used against both Harry and Joseph Katz is a report made by Examining Inspector Griffiths to his superior, the Commissioner of Immigration, on June 12, 1914. (Exhibit "VV", p. 59, attached to petition for writ of *habeas corpus*; p. 111, Immigration Record; see appellant's opening brief, pp. 43-45.)

This report is not sworn to and is made by Examining Inspector Griffiths in his official capacity. It refers to matters not sworn to by a single witness, and refers to other matters clearly incompetent, irrelevant and immaterial. The use of any such official report against appellee, *as evidence against him*, was certainly unfair and deprived him of a full and fair hearing.

As already stated, if the report of Examining Inspector Griffiths be regarded simply in the nature of a recommendation to his superior, the Commissioner of Immigration, no objection could be made to it on that ground. But an examination of that report shows its unfairness to these Katz brothers in that it purports to report matters *as proved facts against them*, when the record shows that not a single witness swears to any such facts. Further, the absurdity of the situ-

ation is realized and the unfairness of the whole proceeding appreciated when the record shows that Inspector Griffiths is the original investigator of the charges against the appellee; that he is the arresting officer; that he is the inquisitor, that is, the examining inspector who has charge of the secret examinations and hearings; that he is the judge who makes his recommendation to his chief, the Commissioner of Immigration. Such being the fact, how, in the name of justice, his report, containing statements of fact against the Katz brothers, which he claims to have gathered from his investigations of a secret and private nature, can be dignified by the name of evidence, is inexplicable to us. Such a proceeding is intolerable and a prostitution of justice itself. Its unfairness is obvious.

As was well said by District Judge Holt, in the frequently cited case of *United States etc. v. Williams*, 185 Fed. 598, 599, after referring to the usual procedure in deportation proceedings:

*"It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. * * * The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge. The secretary who issues the order of arrest and the order of deportation is an administrative officer, who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them; and, if they are deprived*

of any such right, the proceeding is clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IN IT INVALID."

Such a report of the examining inspector, purporting to state *as facts* matters he claimed to have discovered in his investigations, not even being sworn to and the inspector not offering himself as a witness so that he might be cross-examined, was eminently improper and deprived the appellee of that full and fair hearing guaranteed to every one by the laws of this country. As was well said, in *Ex parte Lam Fuk Tak*, 217 Fed. 468, 459, of a somewhat similar situation to that developed in the case at bar:

"At this point the inspector puts in a record: 'On the occasion of the visit to that laundry by the inspector in charge, on or about December 20, 1913, this Chinaman was found engaged in laundry work there—126 Market Street.' * * *

"Except for the statement inserted in the record, *not under oath*, and doubtless without the knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. *It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him.*

"THE STATEMENT OF THE INSPECTOR MUST BE STRICKEN OUT AND

DISREGARDED. THE FACT THAT IT IS INSERTED IN THE RECORD TENDS STRONGLY TO SHOW THAT PETITIONER WAS NOT GIVEN A FAIR HEARING. ELIMINATING THIS STATEMENT, THERE IS NO EVIDENCE UPON WHICH THE ORDER FOR DEPORTATION CAN BE SUSTAINED. LET THE PETITIONER BE DISCHARGED."

And, in *Ex parte Plastino*, 236 Fed. Rep. 295, 297, it was said:

"The statement of the inspector in this record, unsupported by oath, is not testimony. Even though it had been given under oath, it is not testimony which would be admitted in any court, as it is the inspector's conclusion, etc."

The next affidavit is that of Robert A. Peers, husband of Lucy F. S. Peers, the Secretary of the Committee of Fifteen. (Exhibit "DDD," p. 76, attached to petition for writ of *habeas corpus*, p. 155, Immigration Record. See Appellant's Opening Brief, pp. 30-32.)

That affidavit refers principally to Harry Katz. It relates to matters occurring in 1909—five years prior to the arrest of appellee. The affidavit is worthless as competent or any evidence of any facts to support the deportation of either of the Katz brothers. The affidavit abounds in hearsay statements, conclusions, information and belief, and other rash and irresponsible statements, unworthy of the name of evidence. He says:

"The affiant also avers that since that time (1909) the two brothers, Harry Katz and Joseph

Katz, have conducted a house of prostitution on the property described as lot 1 block 2, additional survey of the town of Colfax and it is a well known fact in Colfax that the Katz brothers were interested in the management of this house of prostitution over which Nellie White, a notorious prostitute, presided as madam."

This statement simply represents the conclusions of the affiant that "they have conducted" and "it is a well known fact." The further statement: "The affiant avers that he has never heard these things denied until the arrest of Harry and Joseph Katz in 1914," is not testimony of any fact. The mere fact that he never heard anything denied is no evidence of anything, especially when cross-examination is denied to the appellee and no notice given of the taking of this affidavit. The affidavit further states that "he has frequently heard" and "it was generally understood by the people of Colfax."

Such rash and improper statements do not constitute competent or legitimate evidence upon which to base an order of banishment, especially when cross-examination is denied and no notice given of the taking of the affidavit.

The next affidavit is that of Lucy F. S. Peers (wife of the previous affiant) and the Secretary of the Committee of Fifteen, formed to rid Colfax of houses of prostitution. (Exhibit "EEE," p. 77, attached to petition for writ of *habeas corpus*, p. 154, Immigration Record. See Appellant's Opening Brief, pp. 29-30.)

This Honorable Court will observe that this is *only*

the third affidavit made by the energetic Mrs. Peers to deport the Katz brothers. She made the first affidavit on February 24, 1914, being one of the nine "information and belief" affidavits in support of the application for a warrant of arrest. (Exhibit "J," p. 10.) She made the second affidavit on May 29, 1914 (Exhibit "SS," p. 51), that being the curious document consisting of argument, reports of facts collected by other persons, hearsay, conclusions, etc. The present affidavit is the third. (Exhibit "EEE," p. 77.) In this affidavit, she endeavors to state an interview that occurred between herself and another affidavit-maker, Jeannie K. Lobner (see Exhibit "K," p. 11), and the local District Attorney, George W. Hamilton. Of course, at this interview neither Harry Katz nor Joseph Katz was present, and yet the Immigration authorities courageously and remorselessly violated all the rules of evidence in permitting an affidavit to be used against the Katz brothers wherein Lucy F. S. Peers states a conversation that she had with George W. Hamilton, the District Attorney of Placer County.

Not only are neither Harry Katz nor Joseph Katz bound by what she said or her affidavit-making friend, Jeannie K. Lobner, said, to George W. Hamilton, but such statements are the rankest kind of hearsay testimony and inadmissible in any court of justice.

Aside from that, it is but proper to state that George W. Hamilton, the former District Attorney of Placer County, directly contradicts the third affidavit of Lucy F. S. Peers and third of Jeannie K. Lobner, in an affidavit presented by him in behalf of the Katz

brothers dated August 29, 1914. (Exhibit "MMM," p. 93, attached to petition for writ of *habeas corpus*, Immigration Record.)

This affidavit of George W. Hamilton, in our judgment, so completely demolishes the absurd prosecution, attempted to be built up against the Katz brothers by the Committee of Fifteen, assisted by the over-zealous Immigration Officials and their special counsel, Attorney Frank V. Cornish, that we quote and set the same out in full:

"In re 12020/659.} H. H. Katz, and
 "Katz Cases. } Joseph Katz.

"STATE OF CALIFORNIA, }
 "COUNTY OF PLACER. } ss.

"GEO. W. HAMILTON, being first duly sworn, deposes and says: I am a resident of the City of Auburn, of the above county and state; an attorney at law therein, and have lived therein for over forty years, and practiced my profession therein for the past twenty-five years, and am now residing and practicing law at that place; that my attention and notice has just been called to two certain affidavits made by Lucy F. Peers and Jeannie K. Lobner, dated, respectively, July 31st, 1914, and that I had not, previously, any notice or knowledge thereof, and that as to the statements therein contained, and the facts in relation thereto, deponent, respectfully shows, alleges and represents as follows, to-wit:

"That in the month of August, 1913, I was the duly acting and qualified district attorney of said county and state, and that about that time I was visited, and besought by the ladies in question, to take some official action toward and directed at

the abatement and discontinuance of two houses of prostitution located in the City of Colfax, in said County and State.

"That the said ladies stated and represented themselves to be members of a local committee known as and designated as the 'Committee of Fifteen,' with the intention of, and the purpose, for its organization and existence, of abolishing the above places.

"That both of the above named persons, in that interview showed themselves to be entirely ignorant of the provisions and requirements of the law, and in addition, advised and informed affiant that they intended to have the redress above, regardless of either the inclination or the disposition of the district attorney, if he were not inclined to pursue the course and procedure which they had devised to be followed therein.

"That affiant did in that, and other conversations, with the said ladies named, and other of the committee, use every honorable and reasonable argument and persuasion against their following out their alleged purposes, and explained that they could not, and would not be of assistance therein.

"That affiant gave them all the information which he had, and assured them that he was convinced of the character of the houses, but that he did not then, or at any other time, use the names of any persons, other than the persons actually conducting the said houses, to-wit, Nellie White and Roma Burdell.

"That affiant had not then, and had never had any information, notice or advice that either H. H. Katz or Joseph Katz, were either the owners, or had otherwise to do with either of the said houses.

"That as such district attorney, and in pursuit of my official duties, I had investigated said places, and while convinced of the character, I had never been advised that either of the houses

were either directly or indirectly, or in the remotest degree or manner, sustained or maintained by either of the Katz brothers.

"That the agitations of the Committee of Fifteen, of which Lucy F. Peers was the secretary, and Jeannie K. Lobner, the president, finally led to the formal presentation of the subject to the city trustees of the City of Colfax, the board of supervisors of the county, and the grand jury, and that each of these bodies publicly and formally acted thereon, and refused to take any action in the premises, and that it was not then, or at any of the public presentations of the subject, pretended or represented that the houses in question were contributed to, in any way, except by the above named persons, Nellie White and Roma Burdell, and at no time, except when this alleged charge against the above named Katz brothers was prepared, framed and presented to the federal authority, was there any pretense thereof.

"That with the utmost respect to the names and social standing of the ladies who have made and presented the above affidavits, that their actions and conduct has been repudiated and condemned by every public body in Placer County, and that the same is disclosed by the public record thereof.

"That it has been their open and avowed boast that they would ruin those who did not share their views, or oppose their efforts, and that invariably, and without exception, every local body and commission, and persons conversant and advised of the situation, and of the motives of its advocates, has repudiated and condemned the movement and the methods of the committee.

"GEO. W. HAMILTON.

"Subscribed and sworn to before me this 29th day of Aug. 1914.

"(SEAL) "MARY H. WALLACE, Notary Public."

This affidavit explains, much better than we can, the entire situation at Colfax and the reason for the

hatred and deep-rooted prejudice of the good ladies of Colfax against the Katz brothers.

It is significant that the U. S. Attorney does not set out this affidavit, so favorable to the Katz brothers, in his Opening Brief.

The next affidavit, the *third* affidavit of Minnie G. Williams (Exhibit "GGG", p. 79, attached to petition for writ of *habeas corpus*, pp. 148-148x, Immigration Record—see Appellant's Opening Brief, pp. 18-23) is the most remarkable of all of the affidavits or documents and reports presented against the Katz brothers and upon which warrants of deportation were seriously asked for. A reading of this remarkable affidavit, sworn to on July 29, 1914, will disclose to this Honorable Court to what lengths persons will go who, although their intentions are well meant and to be commended, are ignorant of the rules of evidence and of the laws of the land, and who are willing, in their zeal and partisanship, to prostitute justice itself to accomplish their aim.

This remarkable affidavit of Minnie G. Williams contains a mass of rash and irresponsible statements, many of which are clearly hearsay, others based on information and belief, conclusions, opinions, and anything and everything except legitimate and competent evidence. In fact, the affidavit seems to be rather an argument in which the affiant does not hesitate to heap tirades of abuse on the Katz brothers. Minnie G. Williams has much to learn about the rules of law. She makes the astounding and revolting statement in her affidavit of July 29, 1914, that: "INFORMA-

TION AND BELIEF IS *ALL* THAT IS REQUIRED BY LAW."

Every other affiant, who seeks to deport the Katz brothers, seems likewise imbued with the idea that "information and belief is all that is required by law" to banish the Katz brothers. This view of the law seems to have been shared by the immigration officials themselves, for they accepted these absurd and outrageous affidavits and acted upon them when ordering the deportation of the Katz brothers.

Not only does Minnie G. Williams, in this *third* affidavit, heap abuse upon the Katz brothers and indulge in such rash and irresponsible statements that the affidavit, so called, is not worthy of consideration at all as evidence against the Katz brothers, but she goes to the extent of upbraiding the inoffensive attorneys who happen to represent the Katz brothers and she says: "We pray that unscrupulous lawyers may not be permitted to juggle with the laws of the State and Nation—we pray that justice may be allowed to prevail." (Exhibit "GGG", p. 81.) Such irresponsible and ill-advised statements are the most convincing evidence of the unfairness of the hearings accorded to the Katz brothers and of the fact that they were ordered deported, not on evidence, but on suspicion, conjectures, surmises, abuse, passion and prejudice. We cannot refrain from again quoting from the opinion of Judge Reed in *Hanges v. Whitfield*, *supra*, that the examination

"must be a lawful proceeding, the charge established by competent evidence, and the aliens

afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them. * * * The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact. * * * It is contended in behalf of the inspector that he is authorized under rule 22 of the Bureau of Immigration to arrest and examine the petitioners after the warrant for their arrest was issued, without informing them of their right to counsel, and to deny to them the right upon the hearing required to be given them until such time as he may see fit to thereafter permit them to have counsel. If that is the effect of the rule, it is inconsistent with the usual and uniform procedure in all judicial proceedings under the laws of the United States wherein it is sought to deprive persons lawfully therein of their personal and property rights, and but emphasizes the necessity of immigration officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported, *except upon legal evidence, which establishes, with reasonable certainty, at least, the charges upon which it is sought to deport them.*"

District Judge Connor, in *Ex parte Lam Pui*, 217 Fed. 456, 465, after quoting from Judge Reed in *Hanges v. Whitfield* as above set forth, says:

"Long, and frequently sad, experience teaches that when officers entrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one

race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved. If necessity, or the public safety, demands that swift, unusual, and summary methods of procedure be permitted, the power should be conferred by the people's representative in Congress in clear and unmistakable terms, and not by rules of departments conferring such power upon inspectors."

The next affidavit is that of Jeannie K. Lobner, also her *third* affidavit to secure the deportation of the Katz brothers (Exhibit "FFF", p. 78, attached to petition for writ of *habeas corpus*, 152 Immigration Record).

This affidavit is identical in language with that sworn to by Lucy F. Peers, also her *third* affidavit, to obtain the deportation of the Katz brothers (Exhibit "EEE", p. 77). In fact, they are probably carbon copies of one and the same affidavit. Jeannie K. Lobner, like Lucy F. Peers, pretends to state an interview that occurred between herself and the other affidavit maker, Lucy L. Peers, and the local District Attorney, George W. Hamilton. Obviously, such affidavit is the grossest kind of hearsay and not binding on either of the Katz brothers, neither one of them being present.

The next affidavit is still another affidavit, the *fourth*, by Minnie G. Williams (Exhibit "HHH", p. 82, attached to petition for writ of *habeas corpus*, 151 Immigration Record). It is dated August 1, 1914.

This affidavit is on a par with all of the other affidavits. It cannot be dignified by the name of evidence. It is based upon such absurd statements as:

"It is commonly understood;" "according to general repute;" "it is understood;" "it has generally been accepted as a fact;" "no one was ever heard to deny."

Furthermore, the same objection as to deprivation of right of cross-examination and failure to give notice of the taking of the affidavit is urged as is contended with reference to the other affidavits.

The next curious document purports to be a petition of certain of the citizens of Colfax, dated July 29, 1914, addressed to the Secretary of Labor (Exhibit "III", p. 83, attached to petition for writ of *habeas corpus*, pp. 147-148, Immigration Record—see Appellant's Opening Brief, pp. 23-26). This petition contains the names of all of the persons who had given affidavits, some of them as many, as we have seen, as four affidavits, against the Katz brothers, and perhaps a few others. *It is not even sworn to.* It is the rankest kind of an information and belief paper, and would be inadmissible in any court of the land or in any other proceeding, administrative or otherwise, save possibly an immigration proceeding, where anything and everything seem to be admitted and accepted by some immigration officials in order to deport persons whom they deem undesirable aliens. The appeal to the Honorable Secretary of Labor is couched in such expressions as: "It has been a matter of common knowledge that they were profiting by the earnings of prostitutes;" and: "We, the undersigned, again *affirm our belief* of the guilt of Harry and Joseph Katz."

It must be evident that the use of such a petition must have inflamed the Immigration Officials at Angel

Island and had a deep prejudicial effect upon the Secretary of Labor and deprived the appellee of that full and fair hearing which "the eternal principles of justice and right" accord them. (Language used in *U. S. v. Redfern*, 180 Fed. 500.) The appellee and his brother are pictured as monsters and fiends, and such appeal could not have any effect other than to deeply prejudice their cause before the administrative officers at Angel Island and Washington, resulting in their unlawful deportation.

The next remarkable document, used against the Katz brothers, is a letter and brief, dated August 18, 1914, on the part of Frank V. Cornish, City Attorney of Berkeley, and special counsel for the Committee of Fifteen (Exhibit "JJJ", p. 85, attached to petition for writ of *habeas corpus*, 146 Immigration Record).

This brief is addressed to the Honorable Secretary of Labor and is in the nature of an appeal to the Honorable Secretary of Labor to deport the Katz brothers. It contains a severe criticism of the showing made by the attorneys for the Katz brothers. It purports to state *as facts matters not proved at all, either directly or by any just or legitimate inferences*. It furthermore apparently contains suggestions to the Examining Inspector or to the Commissioner of Immigration—certain suggestions as to what should be incorporated in the adverse recommendations of the Examining Inspector and of the Commissioner of Immigration such as: "Insert for emphasis just after remarks about representative men:" (Exhibit "JJJ", p. 88: "Put in something about the men making affi-

davits being interested in saloons, or the friends of saloon men." (Exhibit "JJJ", p. 88.)

This letter and brief of Attorney Cornish indulges in other severe invectives against the Katz brothers, but the great difficulty about the brief and letter is that it has no facts to support the abuse heaped upon the Katz brothers. But, aside from that, we respectfully submit that it was improper to admit such a brief and letter against the Katz brothers; that the pernicious activity of the special counsel for the Committee of Fifteen deeply prejudiced the cause of the Katz brothers in the minds of the Immigration Officials, and effectually deprived them of a fair and impartial hearing; that there is no authority in the immigration laws or rules of procedure for the employment and appearance of special counsel to assist the Immigration Officials; that such practice is evidence *per se* of unfairness and is most reprehensible. That the use of such brief constituted an unfair hearing under the law declared in *Ex parte Lam Fuk Tak*, 217 Fed. Rep. 468, 469.

Such documents, and such tactics, permitted by the Immigration Officials, to be used against the appellee and his brother, undoubtedly prevented them from having that full, fair and impartial hearing which the laws of this country guarantee to the meanest and humblest person. As was well said in *Ex parte Plastino*, 236 Fed. R. 295, in a case involving deportation on the same charge of receiving, sharing in, or deriving benefit from the earnings of a prostitute: "Justice never hesitates

in according a fair hearing; on the contrary, guarantees it to the worst criminal."

The next affidavit, and *the last*, is that of Edward H. Horn, made August 1, 1914 (Exhibit "KKK", p. 90, attached to petition for writ of *habeas corpus*, p. 153, Immigration Record—see Appellant's Opening Brief, pp. 26-27). It is an exact duplicate of one of the many affidavits of Minnie G. Williams; perhaps a carbon copy; it is dated on the same day, to-wit, August 1, 1914. (Compare Exhibits "HHH" and "KKK", pp. 82-90.) It is subject to the same vices, such statements being permitted as "It was commonly understood;" "According to general repute;" "It is understood;" "No one was ever heard to deny."

The next document is a second adverse report and recommendation of Examining Inspector Griffiths, dated July 23, 1914. (Exhibit "LLL", p. 91, attached to petition for writ of *habeas corpus*, p. 166, Immigration Record—see Appellant's Opening Brief, p. 45.)

This document is subject to the same criticisms and objections urged to a previous adverse report and recommendation of Inspector Griffiths. (Exhibit "VV", p. 59.)

It should be explained, in this connection, that the cases were closed and submitted on June 19, 1914 (see Exhibit "WW", pp. 63-64). The records in both cases were sent on to Washington for consideration and action. Thereafter, the authorities in Washington expressed doubt as to the deportability of the Katz

brothers upon the evidence then presented, and called, from the Commissioner of Immigration, for further evidence and investigation "into the managerial relation of the Katz brothers to the house of prostitution in that town, of which Nellie White was the madam, in February last." (See Report and Recommendation of Examining Inspector Griffiths, of July 23, 1914, Exhibits "HH", "LL", pp. 39-40; see also proceedings at third and last hearing of September 2, 1914, Exhibit "CCC", p. 73, 141 Immigration Record.)

Insofar as this adverse report and recommendation purports merely to be an adverse report and recommendation it, of course, is unobjectionable as a matter of law, however false and fallacious may be the premises upon which it is based; but when this adverse report and recommendation purports to state certain matters, *as facts against the Katz brothers*, as the result of the private and secret investigations of the Examining Inspector then it becomes an offensive and vicious document inadmissible in any court of justice in the land; it is clearly hearsay information and belief, abounds in conclusions, opinions; the statements are those of a prejudiced and partisan officer; it is not sworn to; there is no cross-examination of the officer; he is not offered as a witness; such a document has no place in any proceeding, administrative or otherwise, where the liberty of a person is involved, especially where the penalty is as serious and irreparable as that of banishment.

Furthermore, the matters in the adverse report and

recommendation stated as facts against the appellee are not supported by any direct evidence or any evidence or circumstances testified to by witnesses from which any just and legitimate inferences against the appellant can be drawn.

Ex parte Lam Fuk Tak, 217 Fed. Rep. 468, 469.

In this connection, it should be stated that, when the officials at Washington ordered a re-investigation as to the managerial relation of the Katz brothers with reference to the place run by Nellie White, it was apparently directed to the ownership of the furniture and personal belongings in the house rented by Nellie White, the idea evidently being that, if the proofs showed that the Katz brothers had bought the furniture for the house, that would be evidence of the fact that they were connected with the management of such a place.

Outside of the conjectures and surmises of Examining Inspector Griffiths, and other matters stated by him, entirely unsupported by any evidence, it was affirmatively shown that neither one of the Katz brothers furnished the place, and that Joseph B. Katz had nothing to do with the place except in the mere capacity of landlord, such as paying water-bills, taxes, repairs, etc., as owner of the property.

The affidavit of George J. Meister, connected with the furniture store of Breuner & Company of Sacramento, effectually disposes of any pretense that the Katz brothers furnished the place as a house of ill-

fame for Nellie White. (See Exhibit "KK", p. 43, attached to petition for writ of *habeas corpus*, 132 Immigration Record.) His affidavit shows that Nellie White furnished the place herself. Both of the Katz brothers emphatically deny that they ever furnished the house for any such purposes.

This completes an examination of every single affidavit, or paper, offered against the appellee and disclosed to his attorneys.

The affidavits and evidence introduced on behalf of Harry Katz completely refute the two accusations made against him in the warrant of arrest. Some twenty-one affidavits of reputable citizens of Colfax, Sacramento, Stockton and San Francisco, were introduced as to his good character and the fact that he is a hard-working chiropodist, having a clientele in Sacramento, Stockton, Colfax and other interior towns. The evidence shows affirmatively that he moved from Colfax in 1910 and has since resided chiefly in Sacramento, but that he makes trips to Stockton, Colfax and other interior towns plying his trade as a chiropodist. He does not own the property, as to which the present controversy has arisen. He so swears and he is fully corroborated by his brother Joseph Katz, who swears that he alone owns the property. The property he did own in 1909, another and an entirely different piece of property, he has disposed of and this was prior to the passage of the amendatory act of March 26, 1910, which is not retroactive. Whatever financial arrangements he may have had with his brother, Joseph Katz, in lending him money to make

repairs or in paying for lumber bills, that fact of itself does not establish the charges alleged against him in the warrant of arrest.

Without further elaborating upon the voluminous record presented, we respectfully submit that, as is so appositely stated by Judge Connor in *Ex parte Lam Pui, supra*, "mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue."

Having disposed of the proposition that there is no evidence whatever worthy of the name to support the warrant of deportation, we also make the point that in the admission of the various affidavits, reports, documents, briefs, etc., the appellee was denied a fair and impartial hearing. That question has practically been considered and maintained in the previous pages of this Opening Brief. It is so interwoven with the absence of competent and legitimate evidence that to consider one is to consider the other.

We further invoke the doctrine enunciated in *Hanges v. Whitfield, supra*, and *Ex parte Lam Pui*, 217 Fed. Rep. 456, to the effect that the appellee was denied a full and fair hearing in failing to apprise him that he was entitled to the benefit of counsel at the *very outset* of the secret and preliminary hearing instead of at the *end* thereof.

As was said in *Ex parte Lam Pui*, 217 Fed. Rep. pp. 456, 465:

"Just why the inspector failed to inform petitioner, before subjecting him to the examination, of his right to have, and an opportunity to procure, counsel, is not easy to understand. Such

conduct is so utterly at variance with the course pursued by all judicial officers, both State and Federal, that it arrests the attention and jars the conception of fair procedure."

Several other matters, depriving the appellee of a fair and impartial hearing, could be also urged, but we are satisfied that we have demonstrated that there is no sufficient competent, or any, evidence to support either of the warrants of deportation against the Katz brothers.

Aside from these several palpable violations of what should constitute a full and fair hearing, it is well settled that the burden of proof is on the Immigration Officials.

U. S. ex rel. Castro v. Williams, 203 Fed. 155.

It is not sufficient to raise a doubt.

U. S. v. Hom Lim, 214 Fed. 456.

One cannot be deported on insufficient or illegal evidence.

Ex parte Yabucania, 199 Fed. 865.

Immigration Officials cannot act arbitrarily in refusing to believe persons sought to be deported or their witnesses.

U. S. v. Lee Chung, 206 Fed. 367;

In re Jew Wing Toy, 91 Fed. 240;

Wong Chung v. U. S., 170 Fed. 182, 95 C. C. A. 198;

U. S. v. Leung Sam et al., 114 Fed. 702.

"In determining whether aliens are entitled to admission, the Immigration authorities act in an

administrative and not a judicial capacity, and *must follow definite standards and apply general rules.*"

U. S. v. Uhl, 203 Fed. 152.

"Congress has seen fit to vest the final decision as to the right of aliens to enter the country in the Department of Commerce and Labor, but that department is governed by certain rules and regulations which must be *strictly construed* in conformity with the *eternal principles of justice and right.*"

"It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal."

U. S. v. Redfern, 180 Fed. 500.

In the case of *U. S. v. Williams*, 185 Fed. 598, 599, District Judge Holt, after stating the usual procedure in deportation proceedings, says:

"It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the prosecution. He is held in seclusion, and is not permitted to consult counsel until he has been privately examined under oath. The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge. The secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. Aliens, if arrested are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceed-

ing is clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IN IT INVALID."

The Immigration Officers must strictly follow the rules, which rules must not be inconsistent with established law.

U. S. v. Williams, 185 Fed. 598;
Roux v. Commissioner of Immigration, 203 Fed. 413;
Hanges v. Whitfield, 209 Fed. 675;
Ex parte Lam Pui, 217 Fed. 456;
Ex parte Lam Fuk Tax, 217 Fed. 468;
United States v. Lou Chu, 214 Fed. 463.

In *Ex parte Lam Pui*, 217 Fed. 456, District Judge Connor said:

"Those decisions establish the principle, so just and consistent with conceptions of American jurisprudence, that, before an alien admitted to the United States as a member of the exempt class can be deported, it must be shown by evidence, not merely suspicious circumstances or conjecture, that he has obtained such admission by means of fraudulent representations. Any other rule would be violative of elementary conceptions of justice and fair dealing. In the light of the language used by the courts, the validity of the return to the writ must be examined, not for the purpose of weighing or estimating the value of the evidence, but of ascertaining whether, when tested by well-settled principles, the examination had by the inspector constituted evidence upon which the Secretary of Labor had jurisdiction to order the deportation."

* * * * *

"Long, and frequently sad, experience teaches that when officers intrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards

which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved."

* * * * *

"Inquisitorial methods of fixing guilt upon persons do not commend themselves to the minds of American lawyers or laymen. They are contrary to the genius of our institution."

"In *Harlam v. McGourin*, *supra*, Mr. Justice Day, quoting the language used in *Hyde v. Shine*, 199 U. S. 84, 25 Sup. Ct. 764, 50 L. Ed. 90, 'In the federal courts * * * it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his (petitioner's) discharge,' says:

"In so stating, the learned justice * * * was but affirming the rule well established under section 1014 that there must be some testimony before the Commissioner to support the accusation in order to lay the basis for an order of removal; otherwise, the accused could be discharged upon *habeas corpus*, although the court could not weigh the evidence when the record shows that some evidence was taken.'

"In *United States v. Williams*, 200 Fed. 538, 118 C. C. A. 632 (C. C. A., 2nd Circuit), Judge Noyes wrote the opinion for the court. Judges Coxe and Ward, thinking that their views upon this point were not expressed clearly, concurring, said:

"The opinion does not, however, make entirely clear our views upon a single point. We think that some evidence must be presented to justify a judgment of deportation and that conclusions of law must have some facts upon which to rest. The immigrant may, in a sense, have a fair hearing, although the conclusions drawn by

the executive officers be wholly unsupported by proof.'

"Text-writers and judges have undertaken to define the word 'evidence,' as applicable to judicial investigations, with more or less success. Probably no more satisfactory definition is found, for practical purposes, than that given by Mr. Edward Livingstone:

"'Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied,' Draft, Code.

"It is elementary that in judicial proceedings the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue. The industry of counsel affords a number of illustrative expressions of courts. In *People v. Van Zile*, 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:

"'Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.'

"Judge Caldwell, in *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, well says:

"'The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.'"

In the leading case of *Low Wah Suey v. Backus*, 225 U. S. 460, it is said:

"A series of decisions in this Court has settled that such hearings before executive officers *may* be conclusive *when fairly conducted*. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were *mani-*

festly unfair, that the action of the executive officers were such as *to prevent a fair investigation* or that there was a *manifest abuse of the discretion* committed to them by statute." (Citing *United States v. Ju Toy*, 198 U. S. 253; *Chin Yow v. United States*, 208 U. S., p. 8; *Tan Tun v. Edsell*, 223 U. S. 673.) (Italics ours.)

In the case at bar, we contend that "the proceedings were *manifestly unfair*"; "that the action of the executive officers were such as *to prevent a fair investigation*"; and "that there was a *manifest abuse of discretion*."

But, aside from these questions of irregularities, divesting the proceedings before the Immigration Officials of that fairness required by the law of the land, the all important proposition for which we contend is that there is no sufficient or competent evidence whatever to support the warrant of deportation issued against appellee.

Mere suspicion or conjecture will not suffice, and the deportation of an alien upon suspicion or conjecture will justify a court in concluding that the order of deportation was arbitrary and unfair. These were the views announced in *Backus v. Owe Sam Gow*, 235 Fed. R. 849, by this Circuit Court of Appeals. At the risk of repetition, we again quote the language of that opinion, which we deem apposite to the case now presented for consideration to this Court:

"But mere suspicion or conjecture were not sufficient upon which to base a judgment * * * In the absence of the best evidence attainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and

subject to judicial inquiry. (Citing *United States v. Ju Toy*, 198 U. S. 253, 260, 25 Sup. Ct. 644, 40 L. Ed. 1140; *Chin Yow v. United States*, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; *In re Chan Kan*, 332 Fed. 855, 857—C. C. C.—and cases therein cited.)”

Therefore, if this Honorable Court should conclude, as we confidently believe it must, that there is no evidence to sustain the warrant of deportation, or that the appellee did not have that “full and fair hearing” which the law and the rules and the decisions guarantee to an alien arrested on deportation charges, then the proceedings were “fatally irregular”; and the order of deportation based upon them was therefore *invalid*; and the detention of appellee under such order and warrant of deportation was *illegal*; and he was entitled to his absolute discharge as was held in the case of *United States v. Williams*, 185 Fed. Rep. 598, 604.

We maintain that the judgment of the lower court, discharging the appellee upon the issuance of the writ of *habeas corpus* as prayed for in his petition, was eminently just and proper, and should be affirmed.

Respectfully submitted.

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